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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

DANIEL JOSEPH MCGOWAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether expert testimony concerning the structure and modus operandi of drug-trafficking organizations is categorically prohibited by the Federal Rules of Evidence in a prosecution of a drug courier for importation of narcotics.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-7a) is reported at 274 F.3d 1251.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2001. A petition for rehearing was denied on March 14, 2002 (App., *infra*, 8a-9a). On June 3, 2002, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including July 12, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND RULES INVOLVED

Relevant statutory provisions—21 U.S.C. 841(a), 952(a), and 960(a)—and Federal Rules of Evidence 401, 402, 403, and 702 are set forth in the appendix. App., *infra*, 54a-58a.

STATEMENT

Following a jury trial, respondent was convicted in the United States District Court for the Southern District of California of importation of marijuana in violation of 21 U.S.C. 952 and 960, and possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 27 months' imprisonment to be followed by three years' supervised release. The court of appeals reversed the convictions on the ground that the district court erred in admitting expert testimony concerning the structure of drug-trafficking organizations. App., *infra*, 1a-7a.

1. On June 28, 2000, respondent rented a minivan in La Puente, California, near Los Angeles. The van crossed into Mexico the same day and returned to the United States on June 30. The van crossed back into Mexico on the morning of July 2. On the afternoon of July 2, respondent and a passenger sought reentry in the van into the United States at the Otay Mesa Port of Entry south of San Diego. During a routine border inspection, a U.S. Customs narcotics-detection dog began scratching at the gas tank of the van. In response to questioning by a U.S. Customs Inspector, "[respondent] stated that he was not bringing anything into the United States and had gone to Mexico to go to the mall"; that he was driving a rental car that he "had not lent * * * to anyone"; and that he "had filled the tank with gas a few times previously." App., *infra*, 2a. Further inspection of the van revealed about 45½

pounds of marijuana, with a street value of about $20,000, hidden in the gas tank in 38 vacuum-sealed packages. See *id.* at 2a-3a, 42a.

2. On July 12, 2000, a federal grand jury returned a two-count indictment charging respondent with importation of marijuana, in violation of 21 U.S.C. 952 and 960, and possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Both counts required the government to prove, *inter alia*, that respondent "knowingly or intentionally" engaged in the alleged criminal conduct. 21 U.S.C. 841(a), 960(a)(1).

Before trial, the government provided notice of its intent to introduce expert testimony about the structure of drug-trafficking organizations and, in particular, testimony that the person who loads the vehicle with drugs usually is not the person who drives the drugs across the border. Respondent moved to exclude the evidence pursuant to, *inter alia*, Federal Rules of Evidence 401 and 403. At a motions hearing, the government explained that such expert testimony was admissible in light of the common defense strategy in such cases of pointing to the absence of the defendant's fingerprints on the drugs, and also to "give a context to the situation of what is actually occurring" in order to "help[]" the jury understand "the smuggling activity itself." App., *infra*, 11a. In response, respondent's counsel stated that she "would agree not to ask about fingerprints" at trial, but that she would argue that respondent "did not know the marijuana was in the car, which is the basis for finding him guilty." *Id.* at 13a.

The district court ruled that it would allow the expert testimony in a "very circumscribed" manner. App., *infra*, 14a. The court explained that it would not allow the government's expert to testify "that the driver is always advised of the drug[s] being in the car," but that

it would permit the expert to discuss the "compartmentalization" of the drug-smuggling process—*i.e.*, that "someone places [the drugs] in the vehicle, packages it up and secrets it in the vehicles, and then someone else drives it across the border to someone else who is waiting for it." *Ibid.*

The district court elaborated:

> Those types of things, I think, are important for the jury to understand how the system works. What inferences they might wish to draw or not wish to draw based upon the facts and circumstances in evidence, the time, the orchestration of time is important to determine whether someone is just going to go off on a lark rather than deliver the vehicle at the time and place specified, the fact that they don't have large amounts of money, that their fingerprints aren't on it; all the absence of the evidence that the jury can sit back there and say, well, as the judge said, a reasonable doubt can exist not only from the evidence presented, but from the absence of evidence. We don't have any evidence that shows he touched the drug, loaded the drug, whatever.
>
> I think it is probative for the government to explain to the jury why there is no evidence on that aspect of it.
>
> So whether we run into the situation of the defense arguing it directly or indirectly, I think it is important for the jury to have that understanding.
>
> It helps th[e] jury understand something that they don't know about, and is actually very contrary to what they see in the media as to how the drug transactions work. There they see very rich, flashy

> people transporting drugs, contrary to the way that it has been explained by the experts in many cases that the court has heard about.
>
> However, if it strays into anything that indicates that the drivers know, in other words, the testimony is then we recruit drivers to * * * drive the drugs across the border, that is over the line.

Id. at 15-16a.[1]

3. A two-day trial followed. The government called five witnesses. The first three witnesses were U.S. Customs Service employees who testified about the discovery of the drugs in respondent's van. See 8/29/00 Tr. 218-273. The fourth witness, an employee of the company that rented the car to respondent, testified about respondent's rental agreement. *Id.* at 273-288.

On the second day of trial, the government called its fifth witness, Special Agent Villars of the U.S. Customs Service. App., *infra*, 29a-53a. Special Agent Villars was offered as an expert in marijuana smuggling and value, and respondent did not object to his qualifications or experience. *Id.* at 35a-36a. Special Agent Villars testified about the "compartmentalization" of the smuggling process, stating that each participant has a separate role, and that the person who loads the vehicle with marijuana is not the person who drives the vehicle across the border. *Id.* at 37a-38a. He further explained that, given the separation in functions, fingerprinting generally is not a valuable law enforce-

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[1] In response to respondent's objection to that testimony, the district court further stated that the government was obligated to disclose "[i]f they know of any instance where someone went under the vehicle and took drugs out or whatever without the person knowing about it," or a similar situation. App., *infra*, 26a. The government was unaware of any such evidence.

ment tool in identifying drug couriers, since any prints found on the drug packages likely would belong to the individuals who packaged the drugs and loaded them into the vehicle south of the border, and not the one who drove them across the border. *Id.* at 38a.[2]

During respondent's cross-examination of the government's witnesses and closing argument, counsel referred both directly and indirectly to the absence of fingerprint or other physical evidence tying respondent to the drugs. See App., *infra*, 49a; 8/29/00 Tr. 245 (cross-examination of U.S. Customs Inspector Richard Wilkins); 8/30/00 Tr. 383 (closing argument). The jury returned guilty verdicts on both counts.

4. The court of appeals reversed the convictions and remanded. App., *infra*, 1a-7a. The court held that the admission of Special Agent Villars's testimony required reversal under *United States* v. *Vallejo*, 237 F.3d 1008, amended by 246 F.3d 1150 (9th Cir. 2001). As the court explained, "*Vallejo* * * * held that expert testimony concerning the structure of drug trafficking organizations was inadmissible under Fed. R. Evid. 401 and 403 'where the defendant is not charged with a conspiracy to import drugs or where such evidence is not otherwise probative of a matter properly before the court.'" App., *infra*, 5a. The court found that there were "no principled distinctions" between this case and *Vallejo*: "Vallejo, like [respondent], was apprehended during a border search after marijuana was discovered to be concealed in the vehicle"; Vallejo, like respondent, "was charged with violating 21 U.S.C. §§ 841(a), 952, and

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[2] Special Agent Villars also testified that it is unlikely that fingerprints could be lifted from drug packages found in a gas tank, and that any prints recovered likely would belong to "somebody south of the border." App., *infra*, 36a.

960," and neither "was charged with conspiracy"; the "expert testimony adduced at trial in each case was virtually identical"; and, finally, the government did not show "a connection between the defendant and a drug trafficking organization" in either case. *Id.* at 5a.[3]

REASONS FOR GRANTING THE PETITION

In a series of cases, the Ninth Circuit has held that Federal Rules of Evidence 401 and 403 preclude the admission of expert testimony concerning the structure and modus operandi of drug-trafficking organizations in simple drug-importation prosecutions. Applying that holding, the court of appeals in this case reversed respondent's convictions, even though the district court carefully considered the expert testimony at issue, found that it was relevant in several different respects, and, even then, meticulously limited the scope of the testimony to avoid any possible prejudice. The Ninth Circuit's cases reveal that it has created a per se bar to this form of testimony in a significant category of cases.

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[3] The court also stated that "[n]either Vallejo, nor [respondent], indicated an intent to raise the lack of fingerprint evidence as probative of a lack of knowledge," and elaborated that, in this case, no lack-of-fingerprint defense was "affirmatively raised" or at "at issue when the government expert testified." App., *infra*, 5a-6a. In fact, however, respondent's counsel asked U.S. Customs Inspector Wilkins on cross-examination—before Special Agent Villars's testimony—whether Wilkins "use[d] gloves" when he removed the drugs from respondent's vehicle. 8/29/00 Tr. 245; see App., *infra*, 6a. In addition, respondent's counsel directly referred to the absence of fingerprint evidence during both her cross-examination of Special Agent Villars and her closing argument. *Id.* at 49a. In any event, as explained below, the admissibility of the type of evidence at issue does not turn on whether, or to what extent, a defendant points to the lack of fingerprints or other physical evidence before, or at some point during, the trial.

The rule created by the Ninth Circuit conflicts with the text and common-sense construction of the Federal Rules of Evidence. It also departs from the precedent in other circuits, which routinely upholds the admission of expert testimony concerning the modus operandi of drug smugglers in similar circumstances. The conflict merits this Court's review because the Ninth Circuit's rule categorically excludes a traditional form of relevant and admissible evidence, and thus needlessly complicates the prosecution of a common type of drug offense in the Nation's border districts. Indeed, in the Southern District of California alone, more than 1400 drug-importation prosecutions may be brought a year, and the Ninth Circuit already has set aside several drug-importation convictions under its per se rule.

A. The Ninth Circuit's *Vallejo* Rule Is Incorrect

1. In *United States* v. *Vallejo*, 237 F.3d 1008, amended by 246 F.3d 1150 (2001), the Ninth Circuit held that expert testimony "concerning the structure and modus operandi of drug trafficking organizations" is not relevant in a simple drug-importation prosecution brought under 21 U.S.C. 841(a)(1), 952, and 960, and that admitting such testimony "on the issue of knowledge"—the key issue in such prosecutions—is "unfairly prejudicial, and an abuse of discretion under Rule 403." 237 F.3d at 1017. The court of appeals explained that such testimony unfairly "impli[es]" that the defendant "had knowledge of how the entire organization operated, and thus knew he was carrying the drugs." *Ibid.*; see *ibid.* ("This expert testimony connected seemingly innocent conduct to a vast drug empire, and through this connection, it unfairly attributed knowledge—the sole issue in the case—to Vallejo, a single individual, who was not alleged to be associated with a drug-

trafficking organization in even the most minor way."). In so holding, the court rejected the government's argument that the testimony was admissible "to make up for the lack of fingerprints on the drugs in question." *Id.* at 1016.

Because of the recurring nature of the *Vallejo* fact-pattern, the rule of *Vallejo* already has become a fixture in the Ninth Circuit, and has upset several drug-importation convictions. See App., *infra*, 6a; *United States* v. *Pineda-Torres*, 287 F.3d 860, 866 (9th Cir. 2002) (reversing convictions under 21 U.S.C. 841(a), 952, and 960; "the district court committed prejudicial error [under *Vallejo*] when it admitted expert testimony about the structure of drug trafficking organizations"); *United States* v. *Peralta*, No. 01-50141, 2002 WL 664154, at *1 n.1 (9th Cir. Apr. 23, 2002) ("reversal is required because the district court erred [under *Vallejo*] when it admitted expert testimony about the structure of drug trafficking organizations in this simple, non-conspiracy case"); *United States* v. *Llamas-Garcia*, No. 00-50289, 2002 WL 461358, at *1 (9th Cir. Feb. 27, 2002) (reversing convictions under 21 U.S.C. 841(a), 952, and 960; expert testimony "regarding the structure of cocaine smuggling operations and the role of individuals involved in smuggling * * * was improperly admitted under [*Vallejo*]"); and *United States* v. *Varela-Rivera*, 279 F.3d 1174, 1179-1180 (9th Cir. 2002) (reversing convictions under 21 U.S.C. 841(a) and 952(a); admission of expert testimony concerning the "structure, organization, and modus operandi of drug trafficking enterprises" was prejudicial error under *Vallejo* and *McGowan*). In addition, the Ninth Circuit has declined to reconsider its *Vallejo* decision en banc on two different occasions, first in *Vallejo* itself and second in this case.

2. The Ninth Circuit's *Vallejo* rule conflicts with both a textual and common-sense application of the Federal Rules of Evidence. It is settled that trial courts enjoy broad discretion under the Federal Rules to determine what evidence is relevant and admissible. See *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 152 (1999); *General Elec. Co.* v. *Joiner*, 522 U.S. 136, 141-142 (1997). Nonetheless, the *Vallejo* rule *categorically* strips district courts of discretion to allow a common type of evidence in drug cases, *i.e.*, evidence of the modus operandi of drug smugglers. The Ninth Circuit has reasoned that Federal Rules 401 and 403 compel that prohibition, but that understanding is wrong.

a. Under the Federal Rules, "[a]ll relevant evidence is admissible," except as otherwise excluded. Fed. R. Evid. 402. Rule 401 defines "relevant evidence" to mean "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." As Rule 401's own terms suggest, the "basic standard of relevance * * * is a liberal one." *Daubert* v. *Merrell Dow Pharm., Inc.*, 509 U.S. 579, 587 (1993); accord *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 487 (1997). In addition, as the Advisory Committee Notes accompanying Rule 401 make clear, "[t]he fact to which the evidence is directed need not be in dispute." Accordingly, the Advisory Committee Notes continue, "[e]vidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding."

Expert testimony concerning the structure of drug-trafficking organizations is relevant to the prosecution of simple drug-importation offenses in at least three different respects. First, it helps the jury understand

an activity—*i.e.*, drug smuggling—about which most jurors lack experience. Second, it helps explain why a defendant may not fit the popular stereotype of a drug smuggler but still be a knowing participant in a drug transaction. Third, it helps explain why there might not be more direct evidence (*e.g.*, fingerprints or drug residue on a defendant's clothing) linking the defendant to the drugs—a matter about which a jury can reasonably be expected to speculate in weighing the usual defense that the defendant was duped into driving drugs across the border without any knowledge of the drugs. In other words, the evidence helps explain that the lack of more direct evidence does not necessarily mean that the defendant lacked the requisite knowledge.[4]

The evidence, of course, also assists the government in establishing the ultimate issue—whether the defendant knew about the drugs in his car. The fact that it does so in an indirect, or incremental, manner does not detract from its probative value. To the contrary, the "liberal" definition of relevancy allows "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more

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[4] The district court below recognized all those factors in admitting the evidence at issue. See App., *infra*, 15a-16a (compartmentalization testimony is "probative" because it "helps that the jury understand something that they don't know about, and is actually very contrary to what they see in the media as to how the drug transactions work"; it shows "that [the couriers] are not the great purveyors of the drugs[,] [t]hey don't fit the stereotypical Miami Vice type of concept of a drug dealer, driving fancy expensive cars; that rather everyday people are used to bring the drugs across the border"; and it explains "that [the courier's] fingerprints aren't on it," so that "the government [can] explain to the jury why there is no evidence on that aspect of it.").

probable or less probable than it would be without the evidence." Fed. R. Evid. 401; see *Old Chief* v. *United States*, 519 U.S. 172, 179 (1997) (evidence is relevant if it is "a step on one evidentiary route to the ultimate fact"). In each of the several different respects discussed above, the evidence at issue has that tendency, and therefore readily satisfies Rule 401.

b. Nor is the evidence at issue prohibited as a matter of law under Rule 403, as the Ninth Circuit has ruled. Rule 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." As the Advisory Committee explained, "'[u]nfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an *emotional* one." Fed. R. Evid. 403 advisory committee's note (emphasis added.) This Court has recognized that Rule 403 provides district courts with "wide discretion" in deciding whether to admit or exclude relevant evidence. *United States* v. *Abel*, 469 U.S. 45, 54 (1984); see 1 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 403[03], at 403-49 to 403-51 (1996) ("The usual approach on the question of admissibility *on appeal* is to view both probative force and prejudice most favorably towards the *proponent*, that is to say, to give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value.") (emphasis added).

Even putting to one side the broad deference owed by appellate courts to a trial court's Rule 403 determination, testimony about the "compartmentalization" of functions in drug-smuggling is not in any way inflammatory or likely to evoke an emotional response from the jury—Rule 403's central concern. The Ninth Circuit's rule that such testimony nonetheless is per se

substantially more prejudicial than probative under Rule 403 is based on its belief that the testimony portrays the defendant as "a member of an enormous international drug trafficking organization," and therefore unfairly "implie[s] that he knew of the drugs in his car because of his role in that organization." *Pineda-Torres*, 287 F.3d at 866 (quoting *Vallejo*, 237 F.3d at 1017). Although it is certainly possible that an expert's testimony might unfairly state or convey that impression in a given case, there is no basis for the Ninth Circuit's automatic rule that "compartmentalization" testimony is *always* unduly prejudicial.

As discussed, expert testimony about the structure and modus operandi of drug-trafficking operations allows the jury to understand the context of the smuggling activities at issue and to conclude that gaps in the government's affirmative evidence or a defendant's innocent appearance are not inconsistent with the conclusion that the defendant was a knowing drug courier. The testimony is not an implicit statement that persons like the defendant *are* members of "an international drug organization," see *Pineda-Torres*, 287 F.3d at 864, only that they *might* be. The jury might draw that inference, but only in combination with other facts proved by the government, such as the presence of $20,000 worth of marijuana in the gas tank of the car he was driving, or the defendant's suspicious behavior in going to and from Mexico over a short period of time. At the same time, however, the jury might draw the *opposite* inference, based on the respondent's reliance on the lack of additional evidence or other factors. In *Vallejo*, the Ninth Circuit erroneously deprived the

jury of relevant evidence to resolve those competing inferences.[5]

c. In *Old Chief* v. *United States*, 519 U.S. 172 (1997), this Court held that Rule 403 precludes a district court from rejecting a defendant's offer to stipulate to the fact of a prior conviction in a prosecution for being a felon in possession of a firearm under 18 U.S.C. 922(g)(1). The Court concluded that, in the face of such a stipulation, admitting the full record of the prior conviction, including the name and nature of the prior offense, is unfairly prejudicial. In so holding, the Court pointed to the longstanding tradition of restricting the admission of such "propensity" evidence, 519 U.S. at 180-182, and the availability of an alternative means of proving the prior conviction, namely, the defendant's stipulation to the conviction, see *id.* at 184-185. Neither of those factors is present here. As explained next, the relevant practice, if anything, is to *allow* the type of evidence at issue, and there is no ready alternative to that evidence here. Accordingly, the decision in *Old Chief* provides no support whatever for the Ninth Circuit's rule of *Vallejo*.

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[5] The risk of prejudice stemming from the evidence at issue is even more remote on the record of this case. The district court was meticulous in limiting Special Agent Villars's testimony about the compartmentalization of drug smuggling functions to avoid specific statements that the driver knew about the drugs. See App., *infra*, 16a (barring testimony that "we recruit drivers to drive the drugs across the border"); *id.* at 18a (barring testimony that the driver is going to be paid, unless the door was opened by the defense); *id.* at 25a ("They should be very careful not to say they [the drivers] deliver the drugs, because then that has a knowing aspect to it."). The district court's actions illustrate that trial courts know well how to avoid the admission of possibly prejudicial evidence, without having to operate under the sort of per se prohibition established in *Vallejo*.

To the contrary, *Old Chief* underscores the probative value of the evidence at issue and thus casts further doubt on the Ninth Circuit's categorical decision to exclude such evidence. In *Old Chief*, the Court observed that "[p]eople who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters, and jurors asked to rest a momentous decision on the story's truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard." 519 U.S. at 189. The "compartmentalization" testimony at issue helps a jury understand that "gaps" in evidence connecting a defendant to the drugs, such as fingerprints, do not necessarily mean that the defendant lacked knowledge of the drugs. Even when a defendant does not explicitly point to the lack-of-fingerprint evidence, the jury naturally may be "puzzled" by the prosecution's failure to supply such evidence. The *Vallejo* rule erroneously prevents the government from seeking to put such concerns to rest.[6]

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[6] In *Vallejo*, 237 F.3d at 1017, the Ninth Circuit analogized the type of expert testimony at issue in this case "to the improper use of drug courier profiles," by which it meant an attempt "to link the behavior of the defendant to the behavior common in the courier profile" used "during [law enforcement] investigations." That analogy is flawed. The expert testimony here did not purport to link respondent's characteristics to a generalized profile of drug couriers used in investigations and to argue that he was therefore guilty; rather, the evidence was introduced, *inter alia*, to explain to the jury why evidence that the jurors might expect to hear in a prosecution of an alleged courier (*e.g.*, fingerprint evidence) was not forthcoming. In any event, per se rules for expert testimony that might be viewed as drug-courier profile evidence are not warranted; other courts "have upheld the admission of drug courier profile evidence against Rule 403 objections on several occasions," *United States* v. *Doe*, 149 F.3d 634, 636 (7th Cir.), cert. denied, 525 U.S. 914 (1998) (citing cases); see also, *e.g.*, *United States* v.

B. In Other Circuits, The Type Of Expert Testimony At Issue Is Routinely Allowed In Drug-Smuggling Cases

The Ninth Circuit's *Vallejo* rule conflicts with a wealth of case law in other circuits, which routinely upholds the admission of expert testimony concerning the modus operandi of drug smugglers.

For example, in *United States* v. *Foster*, 939 F.2d 445, 449 (1991), the Seventh Circuit upheld the trial court's decision to allow expert testimony concerning "the methods used by narcotics traffickers" in a drug prosecution where "the only disputed issue at th[e] trial was whether [the defendant] knew that he was transporting controlled substances." The court explained that "expert testimony as to the methods used by drug dealers" is "general[ly]" accepted, and is "helpful to the jury" in placing a defendant's actions in "context." *Id.* at 451 & n.6 (citing cases). While, the court stated, such evidence has a "potential for undue prejudice," the court reasoned that "it is a fair use of [such] expert testimony to offer another explanation for [seemingly innocent] behavior," such as buying a "one-way train ticket, for cash, on the same day as departure from a source city for illegal drugs, under a false name, and carrying a beeper." *Id.* at 452; see *United States* v. *Nobles*, 69 F.3d 172, 178, 182-184 (7th Cir. 1995).

McDonald, 933 F.2d 1519, 1520-1523 (10th Cir.), cert. denied, 502 U.S. 897 (1991), while noting that "the balance between probative value and unfair prejudice must be freshly assessed in each individual case," *Doe*, 149 F.3d at 637. Accordingly, even if certain drug-courier profile evidence may be unduly prejudicial in particular circumstances, there is no support for the Ninth Circuit's *categorical* prohibition on the introduction of types of expert testimony and, for the reasons discussed above, no basis for excluding the testimony offered in this case.

Similarly, in *United States* v. *Chin*, 981 F.2d 1275 (1992), cert. denied, 508 U.S. 923 (1993), the D.C. Circuit (per then-Judge Ginsburg) rejected a challenge to the admission of expert testimony concerning the methods of drug smugglers in a train-courier case. The court explained that, "[i]n accord with the commodious standard of Fed. R. Evid. 702, expert testimony on the *modus operandi* of criminals 'is commonly admitted,' particularly regarding the methods of drug dealers." *Id.* at 1279; see *United States* v. *Mitchell*, 996 F.2d 419, 423 (D.C. Cir. 1993) ("Federal courts often allow expert testimony on narcotics operations to familiarize jurors with the variety of methods by which drug dealers attempt to pursue and conceal their activities.").[7]

Chin and *Foster* discussed the admissibility of such modus operandi testimony in the context of Federal Rules 702 and 704, which govern expert testimony and opinions on ultimate issues. Neither case, however, suggests that any other result would follow under the limits established by Rules 401 and 403. Any expert testimony that is admissible under Rule 702 is within Rule 401's relevance test, since such testimony is only allowed to the extent it "will assist the trier of fact to understand a fact in issue." Fed. R. Evid. 702; see *Daubert*, 509 U.S. at 591. And the broad language used in *Chin* and *Foster* concerning the admissibility of such

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[7] In *United States* v. *Doe*, 903 F.2d 16 (1990), the D.C. Circuit held that expert testimony concerning the modus operandi of drug smugglers was barred under Rule 403 to the extent that it "focused on * * * [drug] dealers tracing their ancestry to Jamaica, and strongly suggested that [defendants] were guilty because two of them are Jamaican." *Id.* at 20. The expert testimony at issue here does not implicate any racial or national origin characteristics, but instead described the structure and modus operandi of drug-trafficking organizations.

expert testimony is inconsistent with the notion that the testimony is per se unduly prejudicial under Rule 403.[8]

Numerous other decisions reject challenges to the admission of modus operandi testimony in similar circumstances. See, *e.g.*, *United States* v. *Rodriguez*, 192 F.3d 946, 949-951 (10th Cir. 1999) (in simple drug-importation prosecution where defendant's knowledge of drugs found in truck was "critical issue," district court erred in excluding pursuant to Federal Rules 401 and 403 evidence concerning the value of seized marijuana); *United States* v. *Flowal*, 163 F.3d 956, 961-962 (6th Cir. 1998) (admission of expert testimony concerning "cocaine distribution practices and street values of cocaine" in case in which key issue was the defendant's intent to distribute drugs was "well within the trial court's broad discretion"); *United States* v. *Doe*, 149 F.3d 634, 636-637 (7th Cir.) (rejecting challenge to admission of expert testimony concerning drug courier profile and modus operandi of drug smugglers; "testimony shed light on the issue of intent by providing a context for Doe's behavior that permitted the jury to infer that Doe must have known that the package contained heroin"), cert. denied, 525 U.S. 914 (1998); *United States* v. *Molina*, 172 F.3d 1048, 1056-1057 (8th Cir.) (rejecting Rule 403 challenge to the admission of expert testimony concerning the "modus operandi of drug dealers" in drug-trafficking case; "testimony provide[d] a context for the jury"), cert. denied, 528 U.S.

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[8] Respondent in this case challenged Special Agent Villars's testimony under Rule 702. App. *infra*, 3a. The district court rejected that challenge, and the court of appeals did not address it because of its conclusion that—under *Vallejo*—the expert testimony was barred under Rules 401 and 403.

893 (1999); *United States* v. *Thomas*, 74 F.3d 676, 680-682 (6th Cir.) (trial court properly admitted expert testimony concerning methods of drug trafficking), cert. denied, 517 U.S. 1162 (1996); *United States* v. *Gastiaburo*, 16 F.3d 582, 589 (4th Cir.) ("We have repeatedly upheld the admission of law enforcement officers' expert opinion testimony in drug trafficking cases"; "[s]uch testimony aids the jury by putting the drug dealer in context with the drug world," a world about which it is "reasonable" to assume "'a jury is not well versed'") (citing cases), cert. denied, 513 U.S. 829 (1994); *United States* v. *Khan*, 787 F.2d 28, 34-35 (2d Cir. 1986) (trial court properly allowed expert testimony concerning drug-trafficking operations under Rules 401 and 403); see also 31A Am. Jur. 2d, *Expert and Opinion Evidence* § 406 (1989) ("Expert testimony as to modus operandi in cases involving drug-related offenses has been accepted in a significant number of cases in recent years.").

Whatever distinctions may be drawn between this case (or *Vallejo*) and the foregoing cases, it is undeniable that the Ninth Circuit's rule that district courts categorically lack discretion under the Federal Rules of Evidence to admit expert testimony concerning the structure of drug-trafficking operations in simple drug-importation prosecutions directly contradicts the weight of precedent in other circuits which defers to trial court rulings admitting the same type of modus operandi testimony in similar drug prosecutions. Particularly given the potent effect that *Vallejo* already has had in border districts within the Ninth Circuit, the circuit conflict warrants this Court's intervention.

C. The Rule Of *Vallejo* Undermines The Administration Of Justice In An Important Area Of Law Enforcement

The rule adopted in *Vallejo* and applied in this case excludes relevant and admissible evidence that aids in the prosecution of a commonly recurring class of drug offenses in the Nation's border districts and, thus, undermines the government's efforts to stem the flow of illegal drugs into this country. The Southern District of California is home to the busiest ports of entry into the United States. In that district alone, there are more than 1400 drug-importation prosecutions a year. In addition, in Fiscal Year 2001, there were more than 3200 drug arrests at southern California ports of entry, and more than 750 additional drug arrests at Arizona ports of entry (also within the Ninth Circuit). The rule of *Vallejo* needlessly complicates scores of drug-importation prosecutions and risks acquittals of knowing drug couriers. Indeed, as discussed, the *Vallejo* rule already has led to reversal of numerous valid drug-importation convictions, including the convictions in this case. This Court's review is warranted to resolve the conflict discussed above and to ensure that knowing drug couriers do not escape conviction and punishment because of the Ninth Circuit's erroneous *Vallejo* rule.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2002

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-50725

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DANIEL JOSEPH MCGOWAN, DEFENDANT-APPELLANT

Argued and Submitted Nov. 9, 2001
Filed Dec. 19, 2001

Before: GOODWIN, WALLACE and THOMAS, Circuit Judges.

THOMAS, Circuit Judge:

Daniel McGowan appeals his convictions for importation of marijuana in violation of 21 U.S.C. § 952 and § 960, and for possession of marijuana with intent to distribute in violation of 21 U.S.C. § 841(a)(1). He argues, *inter alia*, that the district court erred in admitting expert testimony regarding the structure of drug trafficking organizations in a non-conspiracy importation case. Under the circumstances presented by this case, we conclude that admission of the testimony was error.

I

On July 2, 2000, Daniel McGowan drove a 2000 Ford Windstar from Mexico into the United States at the

Otay Mesa Port of Entry, accompanied by a passenger, Mary Joanne Ramirez. While McGowan and Ramirez were waiting in the pre-primary inspection area, U.S. Customs Canine Enforcement Officer Cagigas's dog Spencer alerted to the gas tank of their vehicle by changing behavior and scratching at the tank. Officer Cagigas informed Customs Inspector Wilkins, who was working the primary lane, that Spencer had alerted to the vehicle. Inspector Wilkins then questioned McGowan. In response to Inspector Wilkins's questions, McGowan stated that he was not bringing anything into the United States and had gone to Mexico to go to the mall. McGowan also stated that he was driving a rental car, had not lent it to anyone, had put a quarter tank of gas in the car earlier that day while in San Diego, and had filled the tank with gas a few times previously.

Inspector Wilkins escorted the vehicle and McGowan and Ramirez to the secondary lot where he conducted a more intensive inspection of the vehicle. Wilkins did not initially notice anything out of the ordinary about the vehicle or its gas tank. However, when he tapped the gas tank, he observed that it sounded hard, as if it contained something solid rather than gasoline. Wilkins then observed that the black paint had been scraped off of some of the bolts on the undercarriage of the gas tank, likely by a wrench, leaving shiny marks. Wilkins accessed the inside of the gas tank and removed approximately thirty-eight vacuum-sealed packages, weighing approximately forty-five and a half pounds. The contents of the packages field-tested positive for marijuana. The marijuana packages mostly filled the gas tank, making it so that the tank could hold no more than four to six gallons of gas.

Subsequent investigation confirmed that McGowan had rented the vehicle from Enterprise Rental in La Puente, California on June 28, 2000 in the early afternoon. Border crossing information indicated that the vehicle crossed into Mexico later that afternoon, returned to the United States on the evening of June 30, and crossed back into Mexico on July 2 at 8:15 a.m. Receipts found on McGowan's person at the time of his arrest indicated that he had purchased approximately fifteen gallons of gas from a San Diego gas station on June 28. Other receipts showed that he had made purchases from various stores in Tijuana, Mexico on July 2 between 10:51 a.m. and 12:55 p.m.

McGowan was subsequently convicted of importation of marijuana and possession with intent to distribute marijuana and sentenced to twenty seven months custody and three years supervised release.

II

Prior to the trial, McGowan moved *in limine* for the exclusion of expert testimony concerning the structure of drug trafficking organizations pursuant to Fed. R. Evid. 401, 403 and 702, arguing that it was inadmissible under *United States v. Vallejo*, 237 F.3d 1008 (9th Cir. 2001), *amended* by 246 F.3d 1150 (9th Cir. 2001). The government justified admission of the testimony on the basis (1) that it believed the defense would raise an argument about the lack of fingerprints on the marijuana packages found in the gas tank, and (2) that the testimony would "give a context to the situation of what is actually occurring." McGowan's counsel responded by offering to stipulate that she would not raise the lack of fingerprints as a defense.

The district court denied the motion *in limine*, citing three reasons: (1) the expert testimony would be relevant on the issue of timing; (2) the testimony would explain why drug couriers "don't fit the stereotypical, 'Miami Vice' type of concept of a drug dealer, driving fancy, expensive cars; that rather everyday people are used to bring the drugs across the border"; and (3) the testimony would be relevant to rebut defense arguments concerning the absence of fingerprints on the bags containing the drugs.

During the trial, Special Agent Villars of the United States Customs Service testified regarding the structure of drug trafficking organizations and the reasons that it would not have been useful for the government to fingerprint McGowan's vehicle or the marijuana found there. Specifically, Villars testified that in a drug trafficking organization, each member has a specific duty, with the functions compartmentalized. Villars also testified that fingerprinting the marijuana packaging or the vehicle itself does not help track down perpetrators, because: the packaging used, as well as the presence of gasoline, makes it difficult to lift clear prints; any prints that could be lifted are likely to be those of the packager, not the driver; and the packager is likely to be someone "south of the border" whose prints are not on file. He also testified that fingerprints taken from the vehicle itself are not useful because anyone can touch a vehicle. Villars concluded by testifying that in a drug trafficking organization, the person who loads the vehicle with the marijuana is not same person who drives it across the border.

III

The admission of the expert testimony in this case was improper under *Vallejo*, 237 F.3d at 1015-17, although the district court's error is completely understandable because *Vallejo* was decided after the trial of this case. In *Vallejo*, we held that expert testimony concerning the structure of drug trafficking organizations was inadmissible under Fed. R. Evid. 401 and 403 "where the defendant is not charged with a conspiracy to import drugs or where such evidence is not otherwise probative of a matter properly before the court." *Id.* at 1012. Vallejo, like McGowan, was apprehended during a border search after marijuana was discovered to be concealed in the vehicle. *Id.* at 1012-13. In *Vallejo*, as in this case, the defendant was charged with violating 21 U.S.C. §§ 841(a), 952 and 960. *Id.* at 1012. Neither Vallejo, nor McGowan, was charged with conspiracy, and in neither case did the government introduce any evidence establishing a connection between the defendant and a drug trafficking organization. *Id.* at 1015. Neither Vallejo, nor McGowan, indicated an intent to raise the lack of fingerprint evidence as probative of a lack of knowledge. *Id.* at 1016. The type of expert testimony adduced at trial in each case was virtually identical. *See id.* at 1013-14. In short, upon close examination, there are no principled distinctions to be made between *Vallejo* and the case at bar.

The rationale provided by the district court, albeit without the guidance of *Vallejo*, does not justify a departure from *Vallejo*. The first reason—explanation of timing—is not relevant because the expert witness did not testify concerning the timing of the transaction, nor did the government argue the point. The second reason, dispelling the stereotype of typical drug

couriers, was a rationale we have explicitly rejected as justifying admission of expert testimony in the government's case in chief. *United States v. Beltran-Rios*, 878 F.2d 1208, 1212-13 (9th Cir. 1989). The third reason, rebuttal of an expected defense based on the absence of fingerprints on the drug packages, is a rationale rejected in *Vallejo* when the defendant has not affirmatively asserted the defense. 237 F.3d at 1016. In short, none of the reasons given by the district court remove this case from *Vallejo's* general rule.

Further, contrary to the government's assertion, defense counsel did not "open the door" to admission of the expert testimony at trial. The closest defense counsel came to asserting a lack of fingerprint defense was to question agents about whether they used gloves when examining the evidence. Thus, the issue was not affirmatively raised and was not at issue when the government expert testified. Allowing expert testimony based on an anticipation of a defense that the defendant has not yet asserted is improper. *United States v. Lim*, 984 F.2d 331, 335 (9th Cir. 1993); *Beltran-Rios*, 878 F.2d at 1213 n.2; *see also Vallejo*, 237 F.3d at 1016.

Finally, *United States v. Murillo*, 255 F.3d 1169 (9th Cir. 2001), a case also decided after the trial of this action, is not to the contrary. In *Murillo*, we allowed expert testimony about the operation and structure of drug trafficking organizations in a non-complex, non-conspiracy case. However, in *Murillo*, in contrast to the circumstances involved in both *Vallejo* and the instant case, the defendant "designated a fingerprint expert before trial and argued in his defense at trial that no fingerprints were found on the drug packages." 255 F.3d at 1177. Further, the issue in *Murillo* was purely one of the relevance of the testimony under Fed.

R. Evid. 401 and 704; *Murillo* did not involve an evidentiary challenge under Fed. R. Evid. 403, as did *Vallejo* and the case at bar. Thus, *Murillo* is inapposite.

IV

For these reasons, under the circumstances presented by this case, the expert testimony offered by the government should not have been admitted. Because reversal is required on this issue, we need not reach any other issue urged by defendant.

REVERSED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

D.C. No. CR-00-02249-1-BTM
No. 00-50725

UNITED STATES, PLAINTIFF-APPELLEE

v.

DANIEL JOSEPH MCGOWAN, DEFENDANT-APPELLANT

[Filed: Mar. 14, 2002]

ORDER

Before: GOODWIN, WALLACE and THOMAS, Circuit Judges.

Judge Thomas has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Goodwin has voted to deny the petition for rehearing and recommends rejection of the suggestion for rehearing en banc. Judge Wallace has voted to deny the petition for rehearing, but recommends acceptance of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 00CR2249-BTM
Volume II

UNITED STATES OF AMERICA, PLAINTIFF

v.

DANIEL JOSPEH MCGOWAN, DEFENDANT

[August 29, 2000]
San Diego, California
9:00 o'clock A.M.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE: BARRY TED MOSKOWITZ, JUDGE PRESIDING

* * * * *

[25] MR. SAHAM: * * *

The second issue then is drug organization, which I believe is certainly important in this case with respect to compartmentalization of function.

I believe the defense will make the argument, why weren't fingerprints taken, that kind of thing.

Additionally to give, as found in the case law, to give a context to the situation of what is actually occurring. I think that is very helpful in explaining—explaining the smuggling activity itself, what occurred, giving some background on that.

THE COURT: Well, what are they going to testify to? Who are you going to call and what are they going to be testifying to?

MR. SAHAM: We will call a customs special agent who [26] in addition to value will testify regarding compartmentalization of function, and additionally why taking fingerprints is not necessarily helpful in this type of case.

THE COURT: Well, who are you going to call?

MR. SAHAM: Agent Villars, Robert Villars, who is a senior Special Agent.

THE COURT: Where does he get his information from?

MR. SAHAM: From debriefing—debriefing people through the network, the network which connects different law enforcement agencies and provides intelligence, and from his office from hundreds of ongoing investigations, from his familiarity with his colleagues investigations, and subordinates.

THE COURT: How many people has he debriefed that told him about the structure?

MR. SAHAM: I believe it is hundreds, but I can get that information specifically from him.

THE COURT: Has he also spoken to informants?

MR. SAHAM: In speaking with informants as well, Your Honor.

THE COURT: What about undercover people?

MR. SAHAM: Undercover people. His familiarity with undercover operations as well as general intelligence.

THE COURT: His exact testimony will be?

MR. SAHAM: As far as drug organization, absent the [27] defense opening the door into other areas, just the compartmentalization of function.

THE COURT: Be more specific.

MR. SAHAM: That the person who loads the vehicle is separate from the person who drives the vehicle. That there is, you know, a whole line from the person that grows it, separate from the person who packages it, from the person who loads the vehicle, which is where we are most concerned for this case. The loading, the separation of function, the person who loads the vehicle and the person who drives the vehicle.

THE COURT: They are going to testify that it is separate. And then what? The driver drives it, then what happens?

MR. SAHAM: Driver drives it. Then it is passed on to another individual.

I am not as concerned about the next portion, but where I am really concerned is that—what I really

want to get in is the compartmentalization, that the person who loads is separate.

MR. BLAIR: Your Honor, I would agree not to ask about fingerprints, if that is Mr. Saham's concern.

I don't think that this testimony is at all relevant to whether Mr. McGowan knew. They always try to bring this in to try to show that the driver always knows, and somehow [28] things slip out to try to show that Mr. McGowan is guilty.

If his concern is that I am going to make some issue because they didn't take fingerprints, I would agree not to ask that question. That is what he seems to be saying, is that I am going to maybe say something like, he couldn't have been the one who drove this across the border because his fingerprints were not on the marijuana or the compartment.

If that is his basis for the concern, then I would not ask that question.

THE COURT: Assuming that Ms. Blair does not go into the fact that his fingerprints were not on it, and in her closing argument does not argue there is no evidence that his fingerprints are on it—

Well, aren't you going to argue there is no connection to the marijuana? Aren't you going to argue in closing that all they have is that he was the driver of the vehicle, they haven't connected him to the marijuana at all?

MS. BLAIR: Yes. I am going to argue Mr. McGowan did not know the marijuana was in the car, which is the basis for finding him guilty.

Because they don't have evidence, I don't think that gives them a basis to bring in an expert to then say this is the way it always happens based on all of the information that I don't even know—I have no idea what Mr. Villars has ever looked at. There is just claims he debriefed hundreds of [29] people. I have no idea what the people said, I have no idea what occurred in the debriefings, these discussions with informants, the chats with his friends.

THE COURT: Well, he is not offering testimony that the driver is always advised of the drug being in the car, he just wants to offer the testimony that someone places it in the vehicle, packages it up and secrets it in the vehicles, and then someone else drives it across the border to someone else who is waiting for it.

MS. BLAIR: I just don't see how that is relevant to our case and how that is not prejudicial to Mr. McGowan, because it makes the inference that—of course the person who grew it, the person who put it in the car, the person who picked it up all knew, then of course the driver is going to know.

THE COURT: I am more likely than not going to allow it, but very circumscribed and the testimony can only be for the compartmentalization that goes from the time it is stored in—south of the border in Mexico until the time the driver leaves the vehicle to wherever it is going, either at a parking lot or to someone else. But it is that interval.

The government cannot offer testimony about the fact that drivers are advised, because they haven't ever convinced me. And I have held hearings on this, and I held one very long hearing on it that went like all after-

noon, and in other [30] occasions they have yet to convince me that anyone has any expertise that is anything more than just agent's personal beliefs, one agent saying it another.

They have not disclosed situations that have come up in court to the—situations where the driver—there is evidence that the driver didn't know. The agents don't disclose it because they believe that the driver really did know, but the driver said they didn't know, and that is brady material and they would have to disclose that. So because they haven't been able to do that, and they haven't been able to convince the court that this really is a subject of expertise, I am not going to allow the testimony that the drivers are advised.

I will allow the compartmentalization because I think it is probative in two respects.

Number one, it deals with the issue as to the timing that the—based upon the times I heard this testimony, it has been numerous times, that the timing is important. They deliver it from one place to another, someone is waiting for it. That is crucial.

Also, the fact that they are not the great purveyors of the drugs. They don't fit the stereotypical Miami Vice type of concept of a drug dealer, driving fancy, expensive cars; that rather everyday people are used to bring the drugs across the border. And they don't have a proprietary interest [31] in the drugs, so they don't fit what the popular notion of a drug trafficker would look like.

Those type of things, I think, are important for the jury to understand how the system works. What

inferences they might wish to draw or not wish to draw based upon the facts and circumstances in evidence, the time, the orchestration of time is important to determine whether someone is just going to go off on a lark rather than deliver the vehicle at the time and place specified, the fact that they don't have large amounts of money, that their fingerprints aren't on it; all the absence of the evidence that the jury can sit back there and say, well, as the judge said, a reasonable doubt can exist not only from the evidence presented, but from the absence of evidence. We don't have any evidence that shows he touched the drug, loaded the drug, whatever.

I think it is probative for the government to explain to the jury why there is no evidence on that aspect of it.

So whether we run into the situation of the defense arguing it directly or indirectly, I think it is important for the jury to have that understanding.

It helps that jury understand something that they don't know about, and is actually very contrary to what they see in the media as to how the drug transactions work. There they see very rich, flashy people transporting drugs, contrary to the way that it has been explained by the experts in many [32] cases that the court has heard about.

However, if it strays into anything that indicates that the drivers know, in other words, the testimony is then we recruit drivers to—in other words, we recruit drivers to drive the drugs across the border, that is over the line.

I asked who it was, because some agents walk that line and step on both sides and have chalk on their feet, so to speak, chalk on the botton of their shoes, so to speak, than others. Villars, I don't remember one way or the other.

You have to be very careful with that testimony. It should be very short and simple. The court heard this dozens, literally, dozens of times, that someone packages it, then the person who drives it is not the only one who packages it. And that person—the way it progresses, that person leaves the car at a certain location or gives the car to a certain person, and thereafter was paid.

That is the extent of it. It should be covered in really three sentences. So it really has to be focused on the fact the driver is not the one who loads it, and not the one that is going to sell it.

MS. BLAIR: If the states the driver is then paid, that thereby states.

THE COURT: Isn't your client going to testify he was going to be paid?

MR. SAHAM: Pardon me? I didn't hear what Ms. Blair [33] said.

MS. BLAIR: I am saying that you are saying that he can testify that the driver is then paid. Mr. McGowan had no knowledge of the marijuana in the car. If by saying that the driver is going to be paid, that says the he knew the marijuana was in the car and was going to get paid. I don't know how the agent can

testify to that or how—saying there is no such thing as blind mules.

THE COURT: I will agree with you there. The issue of payment should be left out. If the door is opened to it or it is appropriate in rebuttal, then we will get into the issue of payment.

MS. BLAIR: So he is limited to just saying that the person who packages it and loads it is not the person who drives it.

THE COURT: The person who drives it is not the person who packages and loads it. And their job is to deliver it to another location where somebody will pick it up or leave the vehicle there; in other words, they are the short-hop driver.

MR. SAHAM: Absent financial gain.

THE COURT: In the first go-around.

MS. BLAIR: What was the last part you said, that he can say it is then delivered, or what?

THE COURT: Right. They deliver it to a location. [34] in other words, they drive the car, leave it at a location, or they drive the car to the location and give it to somebody. That is what the testimony has been. In other words, that they are the short-hop driver.

MS. BLAIR: That is not always the case. I have had hundreds of clients, and there are all kinds of scenarios about what happens. Sometimes it is two feet inside the border, sometimes they take it home, sometimes they bring it to someone.

THE COURT: Right. But it is ever the situation where they take it, and then they take it to their own house and package it, and they divide it up? They give it to somebody else.

MS. BLAIR: Right.

THE COURT: They are the short-hop driver in the scheme.

MS. BLAIR: I am just saying by saying that—or inferring that it is just across the border or something like that, I think infers Mr. McGowan is guilty.

THE COURT: Could be across the border and up to Los Angeles, too. I mean, the whole idea is that they don't break it up, weigh it, put it in baggies, and sell it.

MS. BLAIR: Just for the record, I continue to object to any evidence that Your Honor is going to allow and I would ask for a hearing as to his expertise in this area, as [35] well as discovery.

In addition to his claims of debriefing and interrogating smugglers, he also indicates in his resume that he has testified numerous times. I would ask for that prior testimony.

THE COURT: This is what we will do. The focus of the testimony is what the driver does not do; that is, the driver does not load it, does not package it, does not sell it. That is what I will allow. As they break it down, that the driver does not do those things. So that explains why the fingerprints are not on it, why he doesn't have a lot of money in his pocket, et cetera.

As to the testimony, there was a recent Ninth Circuit case decision, you are not entitled to a hearing outside of the presence of the jury on this type of testimony.

However, I want the government to disclose the basis; in other words, the number of persons he has spoken to, exactly what you are going to ask on direct. You should do that in a letter delivered or faxed today. Number of times he has spoken to informants that have given him this information. Also what exact information he is going to testify to.

I assume it is like what I have heard dozens of times, that other people package it, and that the driver drives the vehicle to a given location, and that other people take it from there and divide it up.

[36] MR. SAHAM: That is exactly what he will testify to, your honor.

THE COURT: Do you need any further disclosure than that?

MS. BLAIR: I would like the prior testimony.

THE COURT: No, I mean as to what he is going to testify to.

MS. BLAIR: Yeah, I would like to know exactly what these people have said to him if that forms the basis for his information.

THE COURT: I don't think you are entitled to—he has interviewed 100 people, to what each one of the hundred people have said. You are entitled to know the number of people who told him that who were infor-

mants, who were cooperating defendants, who were undercover people. That you should be provided in advance.

MS. BLAIR: As well as any publications he references.

THE COURT: Right.

MS. BLAIR: What about his prior testimony?

THE COURT: You are not entitled to know his prior testimony. I don't think that is covered by the rule, is it? You are entitled to know the basis, but his prior testimony is not the basis.

They can qualify him by saying he has been declared [37] an expert on other cases, on cross you can ask him about that, you can say, what other cases.

MS. BLAIR: I am just wondering if I can have disclosure of the other cases he testified in, the names at least, to see if he has testified any differently to use for impeachment.

THE COURT: If he has testified differently in those cases you are entitled to it, but you are not entitled to it as general discovery, you are only entitled to it if he has, in fact, testified differently in those cases.

MR. SAHAM: So, Your Honor—

THE COURT: Does the government disagree?

MR. SAHAM: I agree with the court.

THE COURT: Do you want to turn over how many times has he testified?

MR. SAHAM: Other than what we—have it in the letter or in his resume.

THE COURT: I know he has been a case agent at least in here. He may have testified in here.

MR. SAHAM: Your Honor, I certainly wouldn't have copies of the transcripts of his prior testimony, if there is any, certainly Ms. Blair can order those from the court in the same manner I would.

THE COURT: Well—

MS. BLAIR: I wouldn't know.

[38] THE COURT: Are you willing to turn over the names of the cases he testified in?

MR. SAHAM: I don't think we are—if the court orders us. I don't think we are required to under Rule 16. I would object to turning that over.

THE COURT: I agree with the government.

MS. BLAIR: I guess it would be the government's obligation to check and make sure he hasn't testified differently in other cases.

THE COURT: I think the government has to make a reasonable effort, but they don't have to order the transcript in every case. I think they have to make some reasonable effort. They can ask him what he has testified to in other cases.

We are talking about something we hear over and over and over again. Frankly, no one disputes it. This is the bread and butter of the southern district of California. I doubt I have heard anyone testify that, no, it

is the driver that packages the materials and brings it across the border and then sells it themselves, unless it is a couple of pounds.

I have never heard anyone testify to that, nor probably have you. Have you?

MS. BLAIR: No, Your Honor.

My biggest concern is not the testimony that the driver doesn't do these things, it is the testimony that [39] infers that because a person grows it, loads, and delivers it, the driver knows because all of these people know.

The fact that—whenever I have had one of these situations the agent always ends up saying someting improper or that they have been told not to say. Just saying that the driver then will deliver it to someone—

THE COURT: Deliver the car, isn't that what happens? Wasn't that what was happening in the case?

MS. BLAIR: No, Your Honor. Mr. McGowan did not know the marijuana was in the car.

THE COURT: What was he doing with the van?

MS. BLAIR: He was driving home. It was a rental car. He lives in Los Angeles.

THE COURT: He wasn't going to deliver it to anyone else?

MS. BLAIR: No.

THE COURT: I see.

MS. BLAIR: The statement that the driver then delivers the car to someone else, then obviously the driver has to know or they wouldn't know how to deliver it.

If the agent gets on the stand and just says the driver is not the person who packages it or loads it or sells it, then I have less problem with that than to say that the driver then delivers it to someone. Then we are getting too close to saying the driver has to know about the marijuana in [40] order to deliver it to someone.

There is other ways that the drug organizations, I know, can get the drugs out of the car without the person's knowing, they stop them, they pull them over, whatever the basis is.

I just ask that it be limited to, I guess, what your honor stated at one point, that the driver is not the person who loads it, grows it, or sells it.

MR. SAHAM: Then the logical next step—if you are saying, or sells it, that leaves a vacuum and a hole. The driver has to deliver it to someone who does.

I don't see how we can have the distinction that Ms. Blair wants. It would emasculate the testimony entirely.

THE COURT: When you delivers it, my understanding of the testimony is they deliver the vehicle to a location or to a person.

MR. SAHAM: Yes.

THE COURT: But not it being the drugs. They should be very careful not to say they deliver the drugs, because then that has a knowing aspect to it.

MR. SAHAM: To deliver the vehicle.

THE COURT: Right, or leave it in a location.

MS. BLAIR: It is not my understanding that is always the case either.

THE COURT: What else happens?

[41] MS. BLAIR: That there are situations where people are blind mules, and that—

THE COURT: You are free—

MS. BLAIR: The process is to pull somebody over.

MR. SAHAM: Ms. Blair certainly can put on expert testimony, given proper notice, you know, if there is an expert that has a different opinion, then the jury can judge the credibility of the experts.

MS. BLAIR: It is hard to find an agent who would go against what the other agent wants them to say, so I don't have a basis to find someone to say that.

THE COURT: If the government is aware of situations where someone had their vehicle loaded with marijuana, and then they just brought it home, and then someone, you know, while they were watching TV or sleeping or eating dinner or something, climbed under the vehicle, dropped down the gas tank and took the marijuana out of the gas tank, if the government knows of any of that, they have to disclose that to you. That is Brady material. That would run counter to—I

agree with you, that would run counter to their position if the expert's position is that they always deliver it to a location or to someone, and they have evidence that indicates to the contrary, they have to disclose that to you.

MS. BLAIR: They do on occasion. Even the knowing couriers often just drive it home, not deliver it to someone, [42] then the drug smugglers come and get it.

THE COURT: But then they deliver it to a location where the drug smugglers can get it.

MS. BLAIR: They drive it home.

THE COURT: But that is the location.

MS. BLAIR: Then there are innocent people who drive their car home, and the drug smugglers can get the drugs from the car.

THE COURT: If the government knows of any of that, they are required to provide that to you as Brady material.

Does the Government understand that?

MR. SAHAM: Yes, Your Honor.

THE COURT: If they know of any instance where someone went under the vehicle and took drugs out or whatever without the person knowing about it, and then the person later finds out about it, they have to disclose that to you.

Or if they know of informants that said that, we tricked this person to bringing it across, then we went and took the drugs out of the vehicle at the shopping

center where we followed them to, or someting, they have to disclose that to you. That would be Brady material. If they have that information, they have to disclose that.

If they don't go as far as to deal with the delivery aspect, and they just go with they are not the sellers, they are not the loaders, then it is less of a Brady situation.

[43] If they are going to offer expert testimony, which they have in the past, that they deliver to a location or that they deliver the vehicle to a location or a person, they know of situations where that is not the case, then that is Brady material, they have to disclose that.

Now, in terms of expertise, if the person isn't qualified—and I have had situations where they offered a person that, you know, all they have done is spoken to a couple of people, or they have spoken to other agents, and it is just really hearsay that they are reconveying, and it is not really based on their training and experience, truly their experiences, then I won't allow it at all.

This assumes that the government can qualify that person as an expert.

I can tell you, I have not found certain agents qualified to testify to this. Basically, all they have done is heard this from other agents, and had a few instances themselves. Speaking to a few people, a few defendants, a few informants is not enough.

So it depends, when you talk about hundreds, then you are talking about—over a long period of time, then you are talking about understanding a significant sytem and how it works. So that has to be established.

That can be done in the presence of the jury, and then when you say now—when you have done that say, okay, [44] your honor, I would like to ask him his opinion.

Then I will ask Ms. Blair whether she wishes to voir dire the witness on his qualifications. She can either do it then, or wait until cross-examination. If she wants to do it then, and I decide he is not qualified, I am not going to allow the opinion.

Okay?

MS. BLAIR: All right.

THE COURT: Okay.

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APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 00cr2249-btm
Volume IV

UNITED STATES OF AMERICA, PLAINTIFF

v.

DANIEL JOSPEH MCGOWAN, DEFENDANT

[August 30, 2000]
San Diego, California
9:00 o'clock A.M.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE: BARRY TED MOSKOWITZ, Judge presiding

* * * * *

[326] MR. SAHAM: The United States calls special agent Robert Villars.

THE CLERK. Please raise your right hand.

ROBERT VILLARS –
PLAINTIFF'S WITNESS – SWORN

THE CLERK: Thank you. Take the stand. Speak directly into the microphone. State your full name and spell your last name for the record.

THE WITNESS: Robert Villars, V-I double L-A-R-S.

[327] DIRECT EXAMINATION

BY MR. SAHAM:

Q. Good morning, Agent Villars.

A. Good morning.

Q. What is your job?

A. Special Agent with the United States Customs Service.

Q. How long have you been with the United States Customs Service?

A. 13 years.

A. Where are you currently assigned?

A. The operation alliance in Otay Mesa.

Q. What is Operation Alliance?

A. It is a joint task force consisting of Customs, DEA, border patrol, INS, working together in your building.

Q. What is the purpose of it?

A. To basically respond to the needs of the border area.

Q. Specifically relating to?

A. Narcotics.

Q. And what are your duties on that task force?

A. Basically I conduct narcotics smuggling investigations.

Q. How many narcotics investigations have you conducted in your law enforcement career?

A. Personally, approximately 250.

Q. And what did you do prior to your current assignment at operation alliance?

[328]

A. I was a Customs pilot here in San Diego.

Q. What were your primary responsibilities as a Customs pilot?

A. The interdiction of narcotics into the United States by air and also by sea, and also assisting foreign governments in their narcotics apprehension efforts.

Q. And could you briefly describe your training to become a Customs Special Agent?

A. We initially attend 16 weeks at the federal law enforcement training center in Glynnco, Georgia. First eight weeks is just basic general government investigations. Second eight weeks is focusing on Customs, Customs law, and things that Customs do.

Q. And after that academy classroom training, do you receive any field training?

A. Yes. we constantly do seminars put on by the local bureau of narcotics enforcement, DEA seminars, and conferences also. It is an ongoing process.

Q. Could you share with the jury what sources you obtain information from narcotics smuggling and related activities?

A. Basically, the live interviews with the informants, the interviews that are conducted with cooperating defendants, the interviews that you conduct after a search warrant is executed, interaction with other agents.

Also publications. There is the El Paso Intelligence [329] Center, which is run by DEA, publishes a monthly news article, booklet. Also a local—the name is NEN, narcotics enforcement network, an organization just based in San Diego county. They have provided monthly publications.

Q. When you say DEA, what does that stand for?

A. Drug Enforcement Administration.

Q. Going through the sources you mentioned, first, cooperating defendant. What exactly is a cooperating defendant?

A. Cooperating defendant is someone that is within the judicial system who has volunteered to cooperate, and we do—actually, it is interview after the arrest, usually conducted with the Assistant U.S. Attorney office or the District Attorney's Office.

Q. That is someone that has been arrested for their involvement in drug activity?

A. Yes, sir.

Q. Someone presumably with knowledge of drug activity?

A. Yes, sir.

Q. How many of the cooperating defendants during your career have you debriefed?

A. Approximately 40.

Q. And have you participated in other debriefing of cooperating defendants which weren't yours?

A. Yes, I have.

[330] Q. How many of those?

A. Maybe half of that, another 15 to 20.

Q. The second sources you reference were informants.

A. Yes.

Q. What is an informant?

A. An informant is a person with information for money. They come to us with information about illegal activities, and they want a reward.

Q. Those are individuals with knowledge of drug smuggling activities?

A. Yes, they are.

Q. In your law enforcement career, how many of the informants have you dealt with or interacted with?

A. I would say roughly 15.

Q. Additionally, you mentioned as another source of information interviews or debriefings after search warrants.

A. Yes.

Q. Maybe you could briefly describe that process for the jury.

A. Basically, three weeks we did—we executed a search warrant and arrested a defendant, and he immediately wanted to cooperate, so the information was timely, very useful.

Q. So you actually interview these people?

A. Yes, sir.

Q. How many of those in your career have you have taken part [331] in?

A. After search warrants, maybe eight to ten.

Q. And using these sources that—does that allow you to keep up to date on narcotics smuggling activity within this part of the country?

a. Yes, it does.

Q. Are you also familiar with the value of marijuana?

A. Yes.

Q. And can you please tell the jury how you obtained information and learned about the value of marijuana?

A. Again, the informants who come forward with information—we are not allowed to conduct investigations south of the border, so we rely on them to come to us and provide information to us about the pricing and the smuggling techniques south of the border.

Then, again, we interview the cooperating defendant, and also after the search warrants.

Q. Is there something called a "controlled buy"?

A. Yes.

Q. What is a controlled buy?

A. It is basically an undercover operation where an undercover agent goes into a situation and purchases marijuana or some type of narcotics.

Q. Have you been involved in any of those recently?

A. Yes, sir, three.

[332] Q. And does that—being involved in a controlled buy, does that allow you to keep apprised of what the price of marijuana—the going rates of marijuana are?

A. You have to, because if you go in offering too low of a price, they are going to think something is wrong. If you go in offering too high a price, again they are going to think something is wrong. You have to know what you are talking about.

Q. So it is safe to say you keep up with the value of narcotics?

A. Yes.

MR. SAHAM: The United States offers Robert Villars as an expert in smuggling and value of marijuana.

THE COURT: Do you wish to voir dire?

MS. BLAIR: No, your honor.

THE COURT: Do you object?

MS. BLAIR: No, Your Honor.

THE COURT: You may proceed.

BY MR. SAHAM:

Q. Agent Villars, in your investigations of border narcotic busts such as this, have you found fingerprinting on the marijuana packaging or the vehicle itself to be a valuable tool in tracking down perpetrators?

A. No sir.

Q. Why is that?

[333]

A. Basically, several reasons. The packaging that they normally use is not conducive to lifting clear prints. Also, if we were able to lift a print, it would be of somebody south of the border. We have no contact with that. We wouldn't have it in a file, and couldn't match it with anybody.

As far as fingerprinting the van, anybody can touch a conveyance. In a parking lot, someone can come up and touch it. Basically, it is not useful.

Q. You say conveyance, you mean a vehicle?

A. Vehicle. However it is brought into the country.

Q. Additionally, going back to the packaging, it says what the difficulty—how would gasoline interact with the packaging? How would that affect your ability?

A. Gasoline is a solvent, and fingerprints are basically an oil. Just like any solvent used to clean oil, it would destroy it.

Q. Any additional reasons it is not valuable to take prints?

A. Other than not being able to match the up with anybody we would know of would be—

Q. In your opinion, is the individual who—strike that question.

You are familiar with the operation of drug smuggling enterprise, correct?

A. Yes, sir.

Q. Is there any compartmentalization of function in that [334] type of business?

A. Yes, sir.

Q. Could you describe for the jury what you mean by compartmentalization of function?

A. Basically, everybody has their own little duties, own little job. Sometimes it is very specialized, from the person who plants the seed to the person who nurtures the plant then harvests it, to the person that

transports it up here to the border area in bulk, to the person that packages it.

Sometimes they even package it in certain shapes to fit whatever conveyance they are going to use.

The person that acquires vehicles, recruits drivers. A person who crosses it into the United States, a person who accepts it at its destination.

It is compartmentalized. It is like any corporation around. You think of General Motors. They make cars. There is a lot of different people doing a lot of different jobs. They may not talk to each other or see each other. They are doing one thing in trying to build you a car, and you buy it.

Q. In your experience, is the person who loads the vehicle with the marijuana, is that the same person who drives it across the border?

A. No, sir.

MS. BLAIR: Objection. leading.

THE COURT: I will allow that.

[335] BY MR. SAHAM:

Q. Would that be, in fact, another reason why fingerprinting wouldn't necessarily be valuable?

A. Yes, because the person who normally loads the vehicle is not the person who drives it.

Q. Additionally, is the direction of marijuana flow, is that generally coming from Mexico into the United States?

A. Yes, sir. It is definitely Northbound.

Q. It would be usually—somebody wouldn't necessarily want to smuggle marijuana from the United States into Mexico; is that correct?

A. No, sir.

Q. Why is that?

A. First of all, the product is brought here for sale. The demand is high for it. In Mexico, it is not. It is a source country for the growing of the marijuana. They are the wholesalers. They bring it to market in our country.

Q. Inspector Villars—Special Agent Villars, I would like to show you what has been marked for identification as government's Exhibit 7.

THE COURT: Before we go on to that, may I see counsel at sidebar.

(Whereupon, the following proceedings were had at the Bench, outside the hearing of the jury:)

THE COURT: I specifically said that I didn't want [336] him to testify using words such as "recruiting." That implies that when they recruit somebody, they recruit somebody to do a particular job, recruit to drive.

MR. SAHAM: I am sorry. My understanding was that I thought you didn't want to go into any function beyond north of the border.

THE COURT: Right: I didn't want to get into the issue as to what the driver may or may not know. There is no established expertise on that.

Does the defense want me to strike his statement, people recruit drivers?

MS. BLAIR: I am afraid if Your Honor struck it now it would highlight it. At least as it is now, it was in a flow of what he was saying. If your honor strikes it now, it is highlighted and becomes more important than the other items he said. I think to cure it that way would make it worse.

THE COURT: There was no objection at the time. You are not asking me to strike it?

MS. BLAIR: No, Your Honor.

(Whereupon, the following proceedings were had in open Court, in the hearing of the jury:)

THE COURT: One of the jurors needs another hearing aid.

It is working?

JUROR BURTON: It is working fine.

[337] THE COURT: For the court reporter, say your name.

JUROR BURTON: John Burton.

MR. SAHAM: Go ahead.

By MR. SAHAM:

Q. Special Agent Villars, showing you what is marked for identification as government Exhibit 7, could you take a look at this chart?

A. Yes. It is the one I had prepared.

Q. You recognize this chart as the one you caused to be prepared?

A. Yes, sir.

Q. Would this chart assist you in explaining the value of the marijuana to the jury?

A. It would.

Q. Sir, could you step down and use this chart?

THE COURT: Could I see it first?

BY MR. SAHAM:

Q. Agent Villars, using the top portion of the chart, could you please explain to the jury—we can maybe grab the easel. That might be a good idea.

Using the top portion of that chart, could you please explain to the jury the wholesale value of marijuana in July 2000 in Tijuana, Mexico?

A. Sure. Basically, the price in July on the streets of Tijuana is anywhere from 150—to $250 a pound, depending on [338] how much you buy and the quality of the marijuana itself. But using the low figures, 150 times 45—I was told is the size of the load—it is $6,750 to purchase it. Using the high, 250, again 45 pounds, $11,250 to purchase it, 45 pounds.

A. Agent Villars, what is the wholesale value? Explain that concept to the jury.

A. Basically, it is not like a—when you go to the store, go to the market, you are paying retail price. The market buys from the wholesaler in mass quantity. They purchase for a lower price and pass it on to you. Basically, this is a bulk amount, not for personal use.

Q. In using the bottom portion of the chart, can you explain the wholesale value of the marijuana in San Diego county in July 2000?

A. Basically, the price of the marijuana doubles when it crosses the border. In San Diego in July, anywhere from 325—to $450 per pound on the wholesale level. Again, using the 45 pounds, the low figures, 325, 14,625. Using the high figure of 450, 20,250 to purchase this marijuana wholesale on the streets of San Diego.

Q. If you brought the marijuana up to Los Angeles, would the price go up or down?

A. It would be up.

MS. BLAIR: Objection. Irrelevant.

[339] THE COURT: Sustained. The jury is to disregard the last answer.

MR. SAHAM: No further questions.

CROSS EXAMINATION

By MS. BLAIR:

Q. Good morning, Agent.

A. Good morning, Ms. Blair.

Q. Now, Agent Villars, you work for the government, correct?

A. Yes.

Q. You worked for the government for many years?

A. In customs. In the military before that, yes.

Q. Okay. And you testify as an expert for the government?

A. Yes, I do.

Q. You never testify as an expert for the defense. Correct?

A. No, I don't.

Q. Okay. And your job for the past 13 years has been to stop the importation or other types of drugs into the United States?

A. Controlled substances, yes.

Q. Okay. And you'd like to see the highest amount of cases prosecuted, correct?

A. Highest amount of cases prosecuted? How would I answer that? Sure, I guess. It is my job.

Q. Okay. And your testimony as an expert is about generalities. Generally, this is what happens in a drug [340] smuggling.

A. Yes.

Q. Correct?

A. Okay.

Q. In fact, you never met my client before, correct?

A. No, ma'am.

Q. You don't know him?

A. No, ma'am.

Q. In fact, you've never seen him before?

A. Not that I recall.

Q. Were you informed there was a passenger in the vehicle?

A. No, ma'am.

Q. And you don't know anything about that passenger, either?

A. No, ma'am.

Q. Now, most of the cases that are prosecuted at the border, those are mostly reactive cases; isn't that true?

A. What we call reactive.

Q. Could you explain what reactive means?

A. Basically, two types of cases. Reactive, we react. We are summoned to the border to conduct narcotics investigation after seizure is made. We are reacting to the event.

Proactive would be something we initiate on our own, rather than having the inspectors initiate it.

Q. Most of the cases prosecuted at the border are cases where drugs have already been seized?

[341]

A. The vast majority, yes.

Q. And you talked about the sources of information that you have.

A. Correct.

Q. The first one was cooperating defendants, correct?

A. Correct.

Q. And I believe you stated that the cooperating defendants volunteer. That is not entirely accurate, correct?

MR. SAHAM: Objection. Misstates the prior testimony.

THE COURT: Why don't you rephrase the question.

by MS. BLAIR:

Q. I believe you stated that cooperating defendants have volunteered to provide information. Was that your statement?

A. Yes. I certainly don't force them to talk to me.

Q. But those people are people being prosecuted for the importation of narcotics, correct?

A. Majority of them, yes.

Q. And the reason they are talking to you is they are going to get a reduction in their sentence if they cooperate?

A. That is not up to me, that is up to the assistant U.S. Attorney.

Q. You realize that is the purpose somebody is talking to you?

A. Yes.

[342] Q. Why else would they talk to you?

A. I had several do it because of revenue as a motivating—I guess reduction of the sentence, cooperation.

Q. Reduction in the sentence, revenge. If they gave you good information, it is likely also to get a reduction in the sentence?

A. I don't know. I would assume that would be what the deal would be.

Q. You participate in many of these?

A. Yes.

Q. And you had discussions with the prosecuting attorneys?

A. Yes.

Q. They discuss with you whether you think the information that has been given is worthy of a sentencing reduction?

A. If it is truthful and helps, yes. In fact, we have done it twice together, I think.

Q. In addition, you talked to informants?

A. Yes.

Q. That is your other source of information?

A. That is the root source, yes.

Q. Those are people that are paid to give you information?

A. Basically, yes. I have come in contact with some that want to see the people out of the neighborhood. Not revenge, but law-abiding citizens that just want to pass along the information. The majority of them, I would say, they would [343] like a monetary gain.

Q. The majority of the informants are people involved in the drug trade. That is why they have the information to give you, correct?

A. Majority, yes.

Q. Those are your two main sources of information, are cooperating defendants and people being paid, the informants, correct?

Q. Other than the articles published monthly, yes.

q. Okay. The article that is the NEN?

A. The NEN, yes. Also, the booklet from the El Paso intelligence center.

Q. And the NEN article is where you get the price, correct?

A. It is generally—yes. They offer a range. It is based on information obtained by federal local and state officials.

Q. You stated that you are not allowed to investigate south of the border?

A. No, ma'am, I am not.

A. You personally are not. There is, in fact, a liaison that is stationed in mexico?

A. We have one agent attached to the embassy, yes.

Q. Okay, and you indicated that you also participated in controlled buys?

A. Yes.

Q. That is when you are actually buying drugs?

[344] A. Yes.

Q. Personally?

A. Yes, or supervising somebody that is buying drugs, yes.

Q. Now, in the course of your investigations and your talks with the informants and the cooperating defendants, you have become aware that often people who are caught at the border are in Mexico and the United States, live in either Mexico—that cross the border often, I should say.

A. Yes, some of them do. They live in Mexico, yes.

Q. It wouldn't be entirely useless to take fingerprints, correct?

A. If they have come in contact with law enforcement there would be, or they wouldn't have anything on file.

Q. But you wouldn't know that until you ran the fingerprints, correct?

A. Correct.

Q. Now, you talked about there is jobs that are given to different people in this organization.

A. Yes.

Q. And I think it is a—I take it the drug smuggling in mexico, it is a large organization?

A. Consists of a large number of organizations, yes.

Q. Large number of organizations. Okay. And their sole purpose is to get the drugs into the United States. That is how they make their money?

[345]

A. To make money, yes, that is their purpose.

Q. And there are other jobs that you didn't mention, correct?

A. I mentioned a few, yes.

Q. There is a job of somebody who is called a spotter, someone who stands and watches to see if the car gets across?

A. Yes, there are spotters.

Q. That person, their job is to see if the drugs get across the border?

A. Correct. They are watching the vehicles go through the lanes. Once it passes, they get a cell phone or pay phone and call their bosses and say, yes, it crossed.

Q. Are you familiar with people's job, it is to follow the car across the border or lead the car across the border?

A. Yes.

Q. And you testified about how much the drugs were worth?

A. Yes.

Q. And, essentially, they double just across that border?

A. Basically, yes, they double.

Q. And the wholesale value in Mexico, does that take into account all of the production costs, the people that have to be paid in Mexico or—

A. I would imagine, yes.

Q. Is that what is sold for, if it is sold in Mexico?

A. That is what the purchase price is in Mexico if you were [346] to go down there to buy marijuana. I am sure they have the costs figured into the price.

Q. Okay. You said that Mexico is a source country?

A. Yes.

Q. There is marijuana growing all over Mexico?

A. In some regions, yes.

Q. Okay. And the reason—part of the reason why the price jumps so much crossing the border is because of the risk that is entailed at the border?

A. That is one reason.

Q. That is the riskiest part of the operation, correct?

A. That is the point at which it most—it is most likely that the contraband would be discovered, is the port of entry.

Q. Right. There is dogs there, agents there, trained inspectors there.

A. Yes. It is like an hour glass—I don't know if everyone has been to the border. Some of the hour glass is Mexico. The bottom is the United States. That little choke point that the sand goes through, that is the port of entry. Everything comes through the port of entry and exits.

Q. Every car and every person has to pass by a trained agent, correct?

A. Every car passes by an inspector, yes.

Q. Every person who walks cross the border?

A. Yes. If you walk across you have to go by an inspector, [347] at least one.

Q. One of the things that the inspectors are trained to look for when they talk to the car, the people in the cars that cross, whether they are nervous or acting suspiciously?

A. Yes, that would be one indicator.

Q. That would be one way for them to indicate to them perhaps somebody was trying to get contraband across the border?

Q. It would raise their suspicion, yes.

MS. BLAIR: I have no further questions.

REDIRECT EXAMINATION

By MR. SAHAM:

Q. Agent Villars, just a couple of questions. In this case, Mr. McGowan's case, you don't have any idea if there was a spotter or evidence of a spotter?

A. I am not familiar with the case at all.

Q. You don't have any information or evidence of a lead car?

MS. BLAIR: Objection, Your Honor. The witness stated he has no information about this car.

THE COURT: I think it is covered.

MR. SAHAM: That is fine. No further questions.

MS. BLAIR: I have no further questions.

THE COURT: Thank you. Step down.

* * * * *

APPENDIX E

STATUTES AND RULES PROVISIONS

1. Section 841(a) of Title 21, U.S.C. provides:

§ 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

2. Section 952(a) of Title 21, U.S.C. provides:

§ 952. Importation of controlled substances

(a) Controlled substances in schedule I or II and narcotic drugs in schedule III, IV, or V; exceptions

It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, except that—

(1) such amounts of crude opium, poppy straw, concentrate of poppy straw, and coca leaves as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes, and

(2) such amounts of any controlled substance in schedule I or II or any narcotic drug in schedule III, IV or V that the Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs of the United States—

(A) during an emergency in which domestic supplies of such substance or drug are found by the Attorney General to be inadequate,

(B) In any case in which the Attorney General finds that competition among domestic manufacturers of the controlled substance is inadequate and will not be rendered adequate by the registration of additional manufacturers under section 823 of this title, or

(C) in any case in which the Attorney General finds that such controlled substance is in limited quantities exclusively for scientific, analytical, or research uses,

may be so imported under such regulations as the Attorney General shall prescribe. No crude opium may be so imported for the purpose of manufacturing heroin or smoking opium.

3. Section 960(a) of Title 21, U.S.C. provides:

§ 960. Prohibited acts A

(a) Unlawful acts

Any person who—

(1) contrary to section 952, 953, or 957 of this title, knowingly or intentionally imports or exports a controlled substance,

(2) contrary to section 955 of this title, knowingly or intentionally brings or possesses on board a vessel, aircraft, or vehicle a controlled substance, or

(3) contrary to section 959 of this title, manufactures, possesses with intent to distribute, or distributes a controlled substance,

shall be punished as provided in subsection (b) of this section.

4. Rule 401 of the Federal Rules of Evidence provides:

Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

5. Rule 402 of the Federal Rules of Evidence provides:

> **Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible**
>
> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

6. Rule 403 of the Federal Rule of Evidence provides:

> **Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time**
>
> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

7. Rule 702 of the Federal Rules of Evidence provides:

> **Testimony by Experts**
>
> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if

(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

REPLY BRIEF

ORIGINAL

(2)

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
SEP 9 2002
CLERK

NO. 02-64

UNITED STATES OF AMERICA,

Petitioner,

- vs -

DANIEL JOSEPH MCGOWAN,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE UNITED STATES' PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether expert testimony concerning the structure and modus operandi of drug trafficking organizations is properly excluded under Fed. R. Evid. 401 and 403 in a prosecution of an alleged drug courier for importation of narcotics when there is no evidence connecting the defendant to a drug trafficking organization and there is no evidence that a drug trafficking organization participated in the offense.

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IN THE SUPREME COURT OF THE UNITED STATES

No. 02-64

UNITED STATES OF AMERICA,

Petitioner,

- v -

DANIEL JOSEPH MCGOWAN,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO
UNITED STATES' PETITION FOR WRIT OF *CERTIORARI*

Respondent Daniel Joseph McGowan respectfully requests that the Court deny the Solicitor General's petition for a writ of *certiorari* filed on behalf of the United States.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *United States v. McGowan*, 274 F.3d 1251 (9th Cir. 2001).

JURISDICTION

On December 19, 2001, the Ninth Circuit entered its judgment. *United States' Petition for a Writ of Certiorari (Pet.), App.* at 1a. The government's petition for rehearing and suggestion for rehearing *en banc* was denied on March 14, 2002. *Pet. App.* at 8a-

9a. The government has invoked the Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

21 U.S.C. §§ 841(a), 952(a), and 960(a) are set forth at *Pet. App.* 54a-56a.

Fed. R. Evid. 401, 403 and 702 are set forth at *Pet. App.* 56a-58a.

STATEMENT OF THE CASE

A. Facts

At 1:15 in the afternoon on July 2, 2000, respondent drove a 2000 Ford Windstar from Mexico to the Otay Mesa, California, Port of Entry. Respondent had rented the Windstar from Enterprise Rent-A-Car in La Puente, California. Respondent was accompanied by a passenger, Mary Joanne Ramirez. While they were in the pre-primary inspection area waiting to present themselves for entry, U.S. Customs Canine Enforcement Officer ("CEO") Joseph Cagigas was employing a narcotic detection dog to conduct pre-primary inspections. Pre-primary inspections are those conducted prior to reaching the initial inspection booth, and are performed on vehicles seeking to enter the United States. The dog alerted to the gas tank of the vehicle by scratching. CEO Cagigas informed Customs Inspector ("CI") Wilkins, who was working the primary inspection booth, that the dog had alerted to the vehicle.

CI Wilkins asked respondent various questions. In response, respondent stated that he had nothing to declare and that the car was a rental car. He stated that he had been to a mall in Mexico,

an assertion supported by his possession of several receipts from Mexican stores, and that he had not lent the car to anyone. He also stated that he had put a quarter tank of gas in the car earlier that day while he was in San Diego before going to Mexico. He also stated he put gas in a few times before.

CI Wilkins escorted the vehicle, as well as respondent and his passenger, into the secondary inspection lot. After placing respondent and his passenger in a security office, CI Wilkins then performed a more intensive inspection on the vehicle. He did not notice anything out of the ordinary on the vehicle. However, because of his training and experience, he tapped on the gas tank and noticed that it sounded hard. He then looked underneath the vehicle and noticed that the bolts on the gas tank appeared to have been recently removed. Upon removing the gas tank, and then removing the sending unit from the gas tank, CI Wilkins observed several vacuum sealed packages in the gas tank. The tank also contained 4 to 6 gallons of gasoline. The packages contained marijuana. The gross weight of the marijuana seized was approximately 45.6 pounds or 20 kilograms.

B. The Expert Testimony

1. The *In Limine* Hearing

Prior to trial, respondent moved, *in limine*, to exclude the government's proposed expert testimony on the structure and organization of drug smuggling organizations operating in the

Republic of Mexico. Respondent argued that in view of the relatively small quantity of marijuana involved,[1] testimony regarding the structure of smuggling organizations was both irrelevant and, if relevant at all, overly prejudicial. *Cert. Opp. App.* at 1-2. Respondent also requested a hearing on the basis of the expert's opinion. *Cert. Opp. App.* at 2.

The government proffered that its expert would testify regarding "compartmentalization of function" in drug smuggling organizations. *Pet. App.* at 10a-11a. Its primary basis for seeking admission of this testimony was the prosecutor's "belie[f] that the defense will make the argument, why weren't fingerprints taken [from the packages containing marijuana]." *Pet. App.* at 10a. As an additional basis, the government argued that such evidence would "give a context to the situation of what is actually occurring [and that it would be] very helpful in ... explaining the smuggling activity itself, what occurred, [and] giving some background on that." *Pet. App.* at 10a. As to this latter point, the government never explained how the expert's testimony would be helpful to the jury in terms of the "background" it would supposedly provide.

---

[1] The wholesale value, in Tijuana, the relevant market in Mexico, of the quantity of marijuana discovered in the Windstar ranged from $6,750 to $11,250, at the time of the offense. *Pet. App.* at 41a.

In response, respondent's counsel offered not to raise the issue of the lack of evidence that respondent's fingerprints were on the packages, although she did not, for obvious reasons, agree not to argue that respondent lacked knowledge of the marijuana. *Pet. App.* at 13a. The government did not accept this offer, and insisted on offering the evidence.

The district court definitively denied respondent's motion to exclude the expert testimony at the conclusion of the *in limine* hearing. *Pet. App.* at 14a-20a. The district court found that "compartmentalization" was "probative in two respects," neither of which were advanced by the government as bases for admission of the testimony. *Pet. App.* at 15a. "Number one, it deals with the issue as to the timing.... They deliver [the marijuana] from one place to another, [and] some one is waiting for it. That is crucial." *Pet. App.* at 15a.

The second basis for the admission of the testimony advanced not by the government, but by the district court, was that the drug couriers do not fit "the stereotypical Miami Vice type of concept of a drug dealer, driving fancy expensive cars... ." *Pet. App.* at 15a. The district court expressed the view that jurors see "very rich, flashy people transporting drugs" in "the media." *Pet. App.* at 16a.

In addition to stating its own views as to why the government may wish to offer the expert testimony, the district court also

adopted the government's view that it needed to explain why it did not offer evidence of fingerprints lifted from the packages of marijuana: "I think it is probative for the government to explain to the jury why there is no evidence on that aspect of it." *Pet. App.* at 16a.

The district court did place some limitations on the expert testimony, finding that "[t]he government cannot offer testimony about the fact that drivers are [always] advised [of the presence of drugs in the vehicle], because they haven't ever convinced me" that such opinions are based on "any expertise that is anything more than just the agent's personal beliefs." *Pet. App.* at 14a-15a. Thus, the district court concluded that "if [the testimony] strays into anything that indicates that the drivers know [of the presence of the drugs], in other words, the testimony is then we recruit drivers to ... drive the drugs across the border, that is over the line." *Pet. App.* at 16a. Thus, at the conclusion of the *in limine* hearing, it was clear, despite the defense offer not to raise the issue of a lack of fingerprint evidence, that the government would be permitted to elicit expert testimony on the structure of Mexican drug smuggling organizations, even though the district court would not permit the government's witness directly to opine that drivers of vehicles containing contraband always know that the contraband is present.

2. The expert testimony actually offered at trial

At trial, the government offered the testimony of Senior Special Agent Robert Villars of the United States Customs Service. Villars' testimony fully addressed the fingerprint issue without any necessity to resort to testimony regarding the structure of Mexican drug smuggling organizations. First, he testified that "[t]he packaging that [drug smugglers] normally use is not conducive to lifting clear prints." *Pet. App.* at 36a. Thus, a jury would have no reason to believe that fingerprints were even an available source of evidence against respondent.

But even if a fingerprint could conceivably have been placed on the packaging used to wrap the marijuana found in the vehicle driven by respondent, Agent Villars' testimony unequivocally made clear that any fingerprints extant at the time the marijuana was packed would have been destroyed by the 4-6 gallons of gasoline contained in the gas tank.

> Q. Additionally, going back to the packaging, it says what the difficulty -- how would gasoline interact with the packaging? How would that affect your ability?
>
> A. Gasoline is a solvent, and fingerprints are basically an oil. Just like any solvent used to clear oil, it would destroy it.

Pet. App. at 37a. Thus, Agent Villars' testimony was unequivocal: no fingerprint evidence could have been recovered due to the storage of the packages in the gas tank of the Windstar.

Despite the fact that Villars' testimony unconditionally eliminated the possibility of discovering any fingerprint evidence at all, he nonetheless opined that any hypothetical fingerprints that might be recovered likely "would be of somebody south of the border." *Pet. App.* at 36a. In order to explain his opinion that any hypothetical fingerprint might belong to a person in Mexico, Villars explained his understanding of drug smuggling organizations.

> Q. ... You are familiar with the operation of drug smuggling enterprise, correct?
> A. Yes, sir.
> Q. Is there any compartmentalization of function in that type of business?
> A. Basically, everybody has their own little duties, own little job. Sometimes it is very specialized, from the person who plants the seed to the person who nurtures the plant then harvests it, to the person that transports it up here to the border area in bulk, to the person who packages it.
>
> Sometimes, they even package it in certain shapes to fit whatever conveyance they are going to use.
>
> The person that acquires vehicles, recruits drivers.[2] A person who crosses it into the United states, a person who accepts it at its destination.

---

[2] As part of her objections to the admission of the so-called structure testimony, counsel for respondent noted that structure testimony is notoriously difficult to limit: "The fact that -- whenever I have had one of these situations the agent always ends up saying something improper or that they have been told not to say." *Pet. App.* at 23a. Here, Agent Villars testified that the drug smuggling organization "recruits drivers," *Pet. App.* at 37a-38a, even though the district court explicitly prohibited that testimony. *Pet. App.* at 16a. Although the district court later offered to strike it, defense counsel concluded that the remedy would only serve to reemphasize the testimony and therefore declined the offer. *Pet. App.* at 39a-40a.

> It is compartmentalized. It is like any corporation around. You think of General Motors. They make cars. There is a lot of different people doing a lot of different jobs. They may not talk to each other or see each other. They are doing one thing in trying to build you a car and you buy it.

Pet. App. at 37a-38a. Based upon these opinions, Agent Villars concluded that the "the person who loads the vehicle with the marijuana ... is [not] the same person who drives it across the border." *Pet. App.* at 38a.

Agent Villars never identified the drug smuggling organization he thought responsible for the marijuana found in the Windstar nor did he ever opine that the transaction was necessarily the work of an organization at all. Indeed, despite the relatively low wholesale value of the marijuana in Tijuana, Mexico -- $6,750 to $11,250, *Pet. App.* at 41a -- Agent Villars never explained why independent actors, not affiliated with a drug smuggling organization, could not have been responsible.

Agent Villars' testimony did not touch on either of the topics that the district court deemed relevant: the "crucial" issue of "timing" and the purported concern that jurors may rely on "Miami Vice" style stereotypes of how drug traffickers should dress and act. *Pet. App.* at 15a. Although Villars did mention that drug smuggling organizations employ "a person who accepts [the marijuana] at its destination," *Pet. App.* at 38a, he never explained the significance of the "timing" of the delivery. Similarly, Villars provided no discussion at all of the appearance

of individuals who act as drug couriers, or their lack of "fancy, expensive cars" or large amounts of currency.

C. **The Ninth Circuit's Opinion**

The Ninth Circuit Court of Appeals reversed respondent's convictions. *See McGowan*, 274 F.3d 1251. Following its prior decision in *United States v. Vallejo*, 237 F.3d 1008, *amended* 246 F.3d 1150 (9th Cir. 2001), the Ninth Circuit reasoned that the admission of the "structure" testimony violated Fed. R. Evid. 401 and 403. Specifically, the court observed that "[n]either Vallejo nor [respondent] was charged with conspiracy, and *in neither case did the government introduce any evidence establishing a connection between the defendant and a drug trafficking organization.*" *McGowan*, 274 F.3d at 1254 (citing *Vallejo*, 237 F.3d at 1015) (emphasis added). Thus, far from establishing a categorical rule, the Court of Appeals simply analogized to *Vallejo* as another case in which the government lacked evidence linking the defendant to the sort of criminal organization about which it wished to offer evidence.

In so doing, the Court of Appeals rejected each of the three bases upon which the district court originally ruled that the evidence was admissible. First, it found that the government neither offered testimony regarding the issue of "timing" nor did it argue the point. *McGowan*, 274 F.3d at 1254. Second, the Court of Appeals overlooked the fact that no evidence was offered to

explain why drug couriers do not resemble "Miami Vice" type drug traffickers, observing instead that its cases reject the notion that expert testimony "dispelling the stereotype of typical drug couriers" may be offered in the government's case in chief. *Id.* (citing *United States v. Beltran-Rios*, 878 F.2d 1208, 1212-13 (9th Cir. 1989)).[3] Finally, it relied on *Vallejo* to reject the argument that the need to rebut possible inferences from the lack of fingerprint evidence justified admission of the evidence "when the defendant has not affirmatively asserted the defense." *Id.* (citing *Vallejo*, 237 F.3d at 1016).[4]

REASONS FOR DENYING THE PETITION

The Court of Appeals' decision in respondent's case, like its decision in *Vallejo*, 237 F.3d 1008, *amended*, 246 F.3d 1150, does

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[3] *Beltran-Rios* permits the admission of such expert testimony to rebut any defense based upon the defendant's lack of resemblance to the stereotypical drug trafficker. 878 F.2d at 1212-13.

[4] The Solicitor General, relying upon a single cross examination question which did not ask if fingerprint evidence was sought, seems to suggest that perhaps the lack of fingerprints was raised prior to Agent Villars' testimony. *Pet.* at 7 n.3. Respondent's offer not to raise the fingerprint issue at all was made and rejected before the trial even began. A single question that could well have been directed to other issues hardly undermines that offer, which was not accepted at any rate. Morever, the Solicitor General appears to concede that no affirmative mention of fingerprints was made until after Agent Villars testified on direct. *Pet.* at 7 n.3. Thus, as the Court of Appeals observed, "the issue [of the lack of fingerprint evidence] was not affirmatively raised and was not at issue when the government expert testified." *McGowan*, 274 F.3d at 1254.

not create the categorical bar to the admission of expert testimony posited by the Solicitor General. Rather, the Court of Appeals' decisions reach the common sense conclusion that where the government fails to offer *any* evidence linking the defendant to a Mexican drug smuggling organization, the admission of highly prejudicial testimony regarding such organizations is not justified under Fed. R. Evid. 401 and 403. Indeed, the Solicitor General's claim that the Court of Appeals has established a *per se* bar to expert testimony of the sort offered in respondent's case is belied by the numerous post-*Vallejo* cases in which the Ninth Circuit has approved expert *modus operandi* testimony in drug cases.

Contrary to the Solicitor General's contention, the Court of Appeals' decisions in *Vallejo* and the instant case do not *per se* hold "that expert testimony 'concerning the structure and modus operandi of drug trafficking organizations,' is not relevant in a simple drug importation prosecution" and that "admitting such testimony 'on the issue of knowledge' ... is 'unfairly prejudicial, and an abuse of discretion under Rule 403.'" *Pet.* at 8 (quoting *Vallejo*, 237 F.3d at 1017). Instead, the Court of Appeals has rejected the various rationales[5] that the government has advanced

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[5] The government has not been consistent in its arguments in favor of structure evidence. *See, e.g., Pineda-Torres*, 287 F.3d at 864 ("[o]n appeal ..., the government argued that the purpose of the expert testimony was to show that Pineda-Torres knew that drugs were in the car;" no theory was articulated before trial); *Vallejo*, 237 F.3d at 1016 (evidence offered "to

in support of so-called "structure" testimony for a simple, case-specific reason: the government has failed in each of these cases to "introduce any evidence establishing a connection between [the defendant] and a drug trafficking organization." *Vallejo*, 237 F.3d at 1015; *accord United States v. Pineda-Torres*, 287 F.3d 860, 864 (9th Cir. 2002); *McGowan*, 274 F.3d at 1254. As a result, the evidence is irrelevant and, if probative at all, unduly prejudicial because it unfairly "portray[s the defendant] as a member of an enormous international trafficking organization and implie[s] that he knew of the drugs in his car because of his role in that organization." *Vallejo*, 237 F.3d at 1017. But nothing in *Vallejo*, *Pineda-Torres* or respondent's case suggests that, if a proper foundation is offered to establish a connection between the defendant and an organization, "structure" testimony would not be admissible.

Even if the Solicitor General's characterization of *Vallejo* and the instant case was accurate, this case would nonetheless not be the proper vehicle for the Court to examine this issue. Of the three bases relied upon by the district court to authorize admission of the testimony, there was absolutely no evidence as to two of them. Thus, the evidence could only be relevant at all as

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make up for the lack of fingerprint evidence," no knowledge purpose asserted; no theory was articulated before trial); *see also Pet. App.* at 10a-11a (purportedly offered to explain lack of fingerprint evidence and for non-specific "background" purposes).

an explanation for the lack of fingerprint evidence offered by the government. Because the government's expert eliminated *any* possibility of collecting such evidence due to the nature of the packaging employed and the fact that the gasoline in which the packages were placed destroys any fingerprint evidence, there is essentially no justification whatsoever for the admission of the expert testimony sought by the government.

Nor is the Solicitor General's claim that the decisions in *Vallejo* and respondent's case create a conflict with the decisions of other Circuits well taken. As a threshold matter, neither *Vallejo*, *Pineda-Torres*, nor the instant case have ever been cited by a decision from another Circuit. The cases upon which the Solicitor General relies to attempt to manufacture a conflict do not involve the admission of expert testimony regarding criminal organizations to which the defendant is not otherwise connected. Rather, they simply stand for the general proposition that expert testimony on *modus operandi* is admissible in drug prosecutions. The Ninth Circuit has repeatedly rejected challenges to *modus operandi* testimony, holding that *Vallejo* fully supports it. *See, e.g., United States v. Valencia-Amezcua*, 278 F.3d 901, 909 (9th Cir. 2002) ("*Vallejo* expressly approved admissibility of *modus operandi* testimony"). Thus, not a single case cited by the Solicitor General conflicts with *Vallejo*. Moreover, the Second Circuit has reached a conclusion similar to that of the Ninth

Circuit, rejecting the notion that expert testimony regarding organized crime is admissible in the absence of a showing that the defendant is connected to the criminal organization. *See United States v. Long*, 917 F.2d 691, 701-03 (2d Cir. 1990).

A. The Court of Appeals Correctly Determined That the Admission of "Structure" Testimony In the Absence of Any Evidence of a Connection Between the Defendant and a Drug Trafficking Organization Violates Rules 401 and 403.

1. Expert Testimony Regarding a Hypothetical Drug Trafficking Organization to Which the Defendant Is Not Connected by Any Evidence Is Irrelevant.

In *Vallejo*, as was the case in respondent's trial, the government adduced testimony regarding the structure of drug organizations in a simple marijuana importation case without demonstrating any connection between the hypothetical organization and Vallejo. *McGowan*, 274 F.3d at 1254; *Vallejo*, 237 F.3d at 1015. As required by the Court's decision in *General Electric Company v. Joiner*, 522 U.S. 136, 138-19, 143 (1997), the Court of Appeals applied the abuse of discretion standard to the district court's decision to admit the "structure evidence." *Vallejo*, 237 F.3d at 1015.

In reviewing the district court's exercise of its discretion, the Court of Appeals examined the ostensible purpose of the admission of the evidence: "to make up for the lack of fingerprints on the drugs in question." *Vallejo*, 237 F.3d at 1016; *accord Pet. App.* at 10a. Because neither Vallejo nor respondent indicated an

intention to argue that point -- in fact, Vallejo never argued it, 237 F.3d at 1016, and respondent pledged not to raise the issue if the structure evidence were excluded, *Pet. App.* at 13a -- the Court of Appeals correctly ruled that the evidence was irrelevant. *Vallejo*, 237 F.3d at 1015-16; *accord McGowan*, 274 F.3d at 1254. In other words, even though Fed. R. Evid. 401's "basic standard of relevance ... is a liberal one," *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587 (1993), expert testimony offered to explain the lack of evidence rebutting a defense that was never raised does not go to a "fact that is of consequence to the determination of the action." Fed. R. Evid. 401; *see also Daubert*, 509 U.S. at 591 ("'[e]xpert testimony that does not relate to any issue in the case is not relevant and, ergo, non-helpful'") (citation omitted). Moreover, because Agent Villars' non-structure testimony essentially eliminated the possibility of the existence of fingerprints on the contraband, terming the fingerprints issue a "fact of consequence" to the prosecution of respondent is even more tenuous.

To support a finding of relevance, the expert testimony here has additional barriers to overcome. As the Court of Appeals observed, the government offered no evidence that respondent was a member of a Mexican drug trafficking organization. *McGowan*, 274 F.3d at 1254. Nor did the government offer evidence that the smuggling venture in which respondent allegedly participated

necessarily, or even likely, involved the sort of monolithic drug smuggling organization portrayed in Agent Villars' testimony.[6] Indeed, Villars compared the organizations of which he spoke to General Motors, *Pet. App.* at 38a, but he never addressed the question of whether or not a smaller organization, or even an individual, may have been involved. Nor was there evidence that smaller traffickers, or independent traffickers, would behave in a manner consistent with Villars' account. Thus, even assuming that the desire to rebut a defense that has not been asserted raises the fingerprint issue to the status of a "fact that is of consequence," absent any evidence that respondent was a member of a drug trafficking organization, *and* absent any evidence that such an organization was involved in the case, Agent Villars' testimony had no "tendency to make the existence" of an explanation for the lack of fingerprints "more probable or less probable."[7]

Adopting the view of the district court, the Solicitor General relies on three purported sources of relevance. First, without

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[6] The wholesale value of the marijuana in Tijuana, Mexico, was $6,750 to $11,250, *Pet. App.* at 41a, a sum that is presumably within the reach of independent actors.

[7] These flaws in the government's evidence could be viewed as conditional relevance issues. *See* Fed. R. Evid. 104(b). Here, the government failed to meet two conditions to the admission of Villars' testimony. First, it offered no evidence that respondent was a member of such an organization. Second, it offered no evidence that an organization was involved in the offense.

descending to specifics, he claims that "structure" testimony helps the jurors to "understand [drug smuggling,] an activity ... about which most jurors lack experience." *Pet.* at 10-11. A general statement that evidence might touch on a topic with which a juror might not be familiar does not demonstrate that it goes to "a fact that is of consequence." Fed. R. Evid. 401.[8] "Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." Fed. R. Evid. 401, Adv. Comm. Notes. Thus, background information regarding smuggling is not intrinsically relevant.

Second, like the district court, the Solicitor General claims that "it helps explain why a defendant might not fit the popular stereotype of a drug smuggler but still be a knowing participant in a drug transaction." *Pet.* at 11. While the district court did mention this factor, *see Pet. App.* at 15a-16a, it is hard to imagine that there is a juror anywhere, let alone a border region like the Southern District of California, that believes a person

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[8] Because the Solicitor General has largely endorsed the district court's analysis, *see Pet.* at 11 n.4, perhaps he means to adopt the district court's view that "structure" testimony is relevant to issues of "timing." *Pet. App.* at 15a. As the Court of Appeals observed, however, the government neither offered "timing" evidence nor argued it. *McGowan*, 274 F.3d at 1254. The Court should not issue an advisory opinion on the relevance of testimony regarding "timing" that was neither proffered nor given. *See Hayburn's Case*, 2 Dall. 409, 1 L. Ed. 436 (1792).

can't be a drug trafficker unless he is "very rich [and] flashy" and drives "fancy, expensive cars." *Pet. App.* at 15a-16a.[9]

But even if there was any need for such testimony, none was offered, despite the district court's invitation. Thus, again, the Solicitor General is asking the Court to render an advisory opinion regarding testimony that was never given. The Court should decline the invitation. *See Hayburn's Case*, 2 Dall. 409, 1 L. Ed. 436 (1792).

Finally, the Solicitor General merely repeats the same rationale urged by the government below, and rejected in *Vallejo* and *McGowan*: structure testimony "explains why there might not be more direct evidence (e.g., fingerprints or drug residue on a defendant's clothing)[10] linking the defendant to the drugs." *Pet.*

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[9] The Ninth Circuit, like many of the Courts of Appeal, is highly skeptical of "drug courier profile" testimony, such as testimony seeking to describe the appearance of drug traffickers. *See Beltran-Rios*, 878 F.2d at 1210-11 (citing *United States v. Hernandez-Cuartas*, 717 F.2d 552, 555 (11th Cir. 1983)); *accord United States v. Simpson*, 910 F.2d 154, 157 (4th Cir. 1990). As a result, the Court of Appeals here followed *Beltran-Rios*, holding that "dispelling the stereotype of typical drug couriers[] was a rationale we have explicitly rejected as justifying admission of expert testimony in the government's case in chief." *McGowan*, 274 F.3d at 1254 (citing *Beltran-Rios*, 878 F.2d at 1212-13).

[10] The government's suggestion that "a jury can reasonably be expected to speculate" about "residue" on clothing, *Pet.* at 11, is belied by the fact that it never raised this issue below, the district court never ruled on it, and Agent Villars provided no testimony regarding it.

at 11. For the reasons discussed above, an explanation directed to a defense that was never raised is not a fact of consequence.

2. The Prejudicial Effect of Expert Testimony Regarding a Hypothetical Drug Trafficking Organization to Which the Defendant Is Not Connected by Any Evidence Far Outweighs Any Probative Value It May Possess.

The Court of Appeals has also concluded that under Fed. R. Evid. 403, the probative value, if any, of structure testimony is substantially outweighed by its prejudicial effect when there is no evidence linking the defendant to the hypothetical drug smuggling organization. *Pineda-Torres*, 287 F.3d at 864-65; *McGowan*, 274 F.3d at 1254; *Vallejo*, 237 F.3d at 1016-17. With respect to the Court of Appeals' analysis, the Solicitor General identifies no conflict with the Court's cases and does not argue that the Court of Appeals applied the wrong analysis; he simply disagrees. *Pet.* at 12-13.

The Court, however, has explained the significant potential for prejudice associated with expert testimony.

> "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 ... exercises more control over experts than over lay witnesses."

Daubert, 509 U.S. at 596 (quoting Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence Is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991)). The "difficulty in evaluating" expert testimony is exacerbated in cases such as Vallejo's and respondent's because "[w]hen the expert is a government law

enforcement agent testifying on behalf of the prosecution about participation in prior and similar cases, the possibility that the jury will give undue weight to the expert's testimony is greatly increased." *United States v. Alvarez*, 837 F.2d 1024, 1030 (11th Cir. 1988); *accord United States v. Espinoza*, 827 F.2d 604, 613 (9th Cir. 1987) (quoting *United States v. Young*, 745 F.2d 733, 766 (2d Cir. 1984) (Newman, J., concurring)) ("the expert testimony of a law enforcement officer ... carries an 'aura of special reliability and trustworthiness'").

"The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief v. United States*, 519 U.S. 172, 180 (1997) (citing 1 Jack B. Weinstein, Margaret A. Berger, & Joseph M. McLaughlin, *Weinstein's Evidence* § 403[03] (1996)). The unfair prejudice arising from the structure testimony is easily identified. As the Court of Appeals observed in *Vallejo*, "the implication of [the expert's] testimony was that Vallejo had knowledge of how the entire organization operated, and thus he knew he was carrying drugs." 237 F.3d at 1017. In short, the testimony

> portrayed [Vallejo] as a member of an enormous international drug trafficking organization and implied that he knew of the drugs in [the] car because of his role in that organization. This expert testimony connected seemingly innocent conduct to a vast drug

> empire, and through this connection, it unfairly attributed knowledge -- the sole issue in the case -- to Vallejo, a single individual, who was not alleged to be associated with a drug trafficking organization in even the most minor way.

Id.; *accord Pineda-Torres*, 287 F.3d at 865 ("an expert providing testimony about the structure of drug trafficking organizations attributes knowledge to the defendant by attempting to connect him to an international drug conspiracy and thus implies that the defendant 'participated in a large-scale operation'") (citation omitted); *accord Long*, 917 F.2d at 702 (admission of expert testimony on organized crime figures who were not connected to the defendants "had the effect of implicating [the defendants] as part of a much larger criminal organization and associating them with all the sinister aspects and activities of that criminal organization");[11] *see also Alvarez*, 837 F.2d at 1030 ("[w]here a government law enforcement agent testifies as an expert, on behalf of the prosecution, a serious risk of undue prejudice exists[, and t]he risk is particularly great where ... there is no direct evidence of knowledge"). The implication that Vallejo was "a member of an enormous international drug trafficking organization"

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[11] In fact, the Second Circuit has strongly condemned the notion that guilt may be inferred from the activities of other persons involved in crime. *United States v. Castillo*, 924 F.2d 1227, 1234 (2d Cir. 1991) ("we take serious issue with the Government's use of an expert witness to propound the impermissible theory that appellants' guilt could be inferred from the behavior of unrelated persons"); *accord United States v. Cruz*, 981 F.2d 659, 663 (2d Cir. 1992) (same).

and therefore had knowledge, *id.*, is plainly a method by which "the factfinder [could be lured] into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief*, 519 U.S. at 180.

The prejudice identified in *Vallejo* and *Pineda-Torres* was pronounced in respondent's trial. The structure testimony similarly implied to the jury that an international drug trafficking organization was responsible for the marijuana seized from the Windstar and that respondent was a member of it, even though there was no evidence on either point. As noted above, the expert never opined that the relatively small amount of marijuana seized in respondent's case was necessarily, or even likely, attributable to a monolithic marijuana manufacturing and smuggling organization that resembled General Motors. *Pet. App.* at 37a-38a. But that analogy certainly implicated respondent as a knowledgeable member of the organization: General Motors does not conceal its manufacture or transportation of vehicles from its employees.

Nor could the prejudice be dispelled by cross examination. As the Second Circuit observed,

> [t]he fact that the agent did not testify about the particular facts of the instant matter does not reduce the prejudice. This sort of generalized information -- by definition not directly related to the case at hand -- was quite prejudicial in a case with so thin a nexus to organized crime. For example, because it was so generalized, cross examination could not blunt its prejudicial effect.

Long, 917 F.2d at 702.

The Solicitor General makes the odd suggestion that testimony about Mexican drug trafficking organizations that resemble General Motors "is not in any way inflammatory or likely to evoke an emotional response from the jury." *Pet.* at 12. It is well settled that in the context of Rule 403, "[p]articular difficulties arise when the proffered evidence connects a party with an emotionally charged public issue, such as organized crime or narcotics." 2 Jack B. Weinstein, Margaret A. Berger, & Joseph M. McLaughlin, *Weinstein's Federal Evidence* § 403.04[2], 403-46 (2d ed. 2002) (footnotes omitted); *see also Long*, 917 F.2d at 702 (expert testimony on organized crime figures "operated less to aid the jury than to prejudice it"). The testimony at issue here involves both "organized crime [*and*] narcotics." *Id.* Moreover, the citizens of a border region like the Southern District of California are uniquely concerned with, and about, such organizations and the frequently horrific crimes attributed to them. *See, e.g., Q&A: Gregory A. Vega, Former U.S. Attorney, Southern District of California*, San Diego Union Tribune, Opinion Section, June 17, 2001, available at 2001 WL 6467166 (detailing U.S. Attorney's office's efforts to combat the Arellano-Felix drug trafficking organization based in Tijuana, Mexico); Robert J. Caldwell, *Still At Large: Tijuana's Arellano Felix Drug Cartel Defies the United States and Mexico*, San Diego Union Tribune, Opinion Section, April

8, 2001, available at 2001 WL 6452819 (attributing murder and torture of three Mexican drug prosecutors to the Arellano Felix Organization).

This substantial showing of prejudice must be evaluated in the light of the probative value of the evidence and the availability and quality of replacements: the district court's discretion under Rule 403 is "informed not only by assessing an evidentiary item's twin tendencies [to provide probative value and undue prejudice], but by placing the result of that assessment alongside similar assessments of evidentiary alternatives." *Old Chief*, 519 U.S. at 184-85. In other words, "[i]f an alternative were found to have substantially the same or greater probative value but a lower danger of unfair prejudice, sound judicial discretion would discount the value of the item first offered and exclude it if its discounted probative value were substantially outweighed by unfairly prejudicial risk." *Id.* at 182-83. The Court's analysis in *Old Chief* plainly supports the Court of Appeals' decision.

In respondent's case, the only basis for which the evidence was actually employed was to provide an explanation of the lack of fingerprint evidence on the packages of marijuana.[12] The probative value of the structure evidence on this issue, if any, must be

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[12] No evidence was proffered or presented by the government on the district court's theories of establishing "timing" and rebutting stereotypical perceptions of drug couriers.

"discounted," *id.*, by its potential for undue prejudice of the form identified by the Court of Appeals. *See Vallejo*, 237 F.3d at 1017.

After performing this discounting, the evidence must be scrutinized in relation to "similar assessments of evidentiary alternatives." *Id.* at 184-85. Here, the "evidentiary alternatives" are (1) an offer by the defense not to raise the issue -- in effect a concession that the point is not exculpatory -- and (2), perhaps more importantly, Agent Villars' testimony that not only is it unlikely that fingerprints could be left on the packages of marijuana, but that any such fingerprints would have been destroyed by the gasoline in which the packages were found. *Pet. App.* at 36a-37a.[13] Because these latter two considerations would essentially remove the fingerprint issue from the case -- in *Old Chief*'s terms, they have "greater probative value" than the structure testimony -- "sound judicial discretion" compels the conclusion that the "discounted probative value [of the structure evidence was] substantially outweighed" by the risk of unfair

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[13] The Solicitor General inexplicably contends that "there is no ready alternative to [the] evidence [at issue] here." *Pet.* at 14. In making that claim, he does not explain what purpose the evidence serves, but he presumably means to refer to the fingerprint issue, the only basis for which the structure evidence was offered at trial. As addressed in text, Agent Villars' non-structure testimony about the difficulty of lifting fingerprints and their destruction by gasoline are certainly "ready alternatives" for that purpose.

prejudice. *Id.* at 182-83. As a result, the Court of Appeals correctly found the district court abused its discretion.

Nor is there any legitimate concern that preventing the government from adducing evidence regarding a hypothetical drug smuggling organization will deny the government the "evidentiary depth [it needs] to tell a continuous story" of the offense. *See Old Chief*, 519 U.S. at 654. In recognizing that the prosecution should be free to reject stipulations in situations where acceptance would deny the government the full effective weight of its evidence, the Court observed that "the evidentiary account of what a defendant has thought and done can accomplish what no set of abstract statements ever could, not just to prove a fact, but to establish its human significance, and so to implicate the law's moral underpinnings and a juror's obligation to sit in judgment." *Id.* at 653-54. The evidence here, however, is not an "evidentiary account of what [respondent] thought and [did];" rather, it is a generalized account of the activities of a hypothetical, monolithic organization, unrelated to respondent and unconnected to the offense. None of *Old Chief*'s concerns are implicated by the exclusion of that evidence.[14]

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[14] Citing *Old Chief*, the Solicitor General suggests that "the jury may naturally be 'puzzled' by the prosecution's failure to supply ... evidence" explaining the absence of fingerprint evidence. Pet. at 15 (citing *Old Chief*, 519 U.S. at 189). It is highly unlikely that a jury that did not receive structure testimony but was told that fingerprints were very likely not

B. ***Vallejo* and *McGowan* Do Not Conflict With the Decisions of Any Circuit.**

Despite the Solicitor General's insistence that the decision in *Vallejo* and respondent's case "conflict[] with a wealth of case law in other circuits," there is no such conflict: the cases he cites do not address the propriety of admitting expert testimony regarding a criminal organization to which the defendant has no connection and as to which there is no proof of its involvement. Moreover, the Solicitor General has jumped the gun; no other Circuit has even cited, much less rejected, *Vallejo*, *McGowan* or *Pineda-Torres*. In fact, the Second Circuit has reached a similar result in a case involving testimony about organized crime in which the defendants were unconnected to the organization. *See Long*, 917 F.2d at 702-03.

The Solicitor General's argument appears to be that any case which approves some sort of expert testimony on *modus operandi* or, apparently, any other issue related to drug trafficking, conflicts with the decisions in *Vallejo* and the instant case. None of the cases he cites present fact patterns analogous to respondent's case. Moreover, his premise -- that *Vallejo* and respondent's case create a *per se* rule that is inconsistent with drug *modus operandi* cases -- is flawed: the Ninth Circuit itself has confirmed that

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left on the packages and that any that were left were destroyed by gasoline would be "puzzled" about the lack of additional evidence on the fingerprint issue.

such evidence remains admissible post-*Vallejo* and that *Vallejo* established no such per se rule. *See, e.g., Valencia-Amezcua*, 278 F.3d at 909.

As a threshold matter, the Solicitor General's claim that the *modus operandi* evidence he discusses is upheld "routinely," Pet. at 16, overlooks the substantial body of caselaw suggesting that such evidence, often described as "drug courier profile" evidence, should not be admitted as substantive evidence of guilt. For example, in *United States v. Brito*, 136 F.3d 397 (5th Cir. 1998), the government offered evidence of "a profile of family drug organizations," and then compared the defendants -- several family members -- to the profile. The Fifth Circuit flatly rejected such testimony: "[t]his type of profile evidence is inadmissible to prove substantive guilt based on similarities between defendants and a profile." *Id.* at 412 (citing *United States v. Williams*, 957 F.2d 1238 (5th Cir. 1992)).

Other Circuits employ similar reasoning. *See, e.g., United States v. Small*, 74 F.3d 1276, 1283 (D.C. Cir. 1996) ("drug-courier profile evidence was relevant only to the officers' probable cause and not to Small's guilt") (citations omitted); *United States v. Jones*, 913 F.2d 174, 177 (4th Cir. 1990) ("the trial court abused its discretion [by] admit[ting] expert testimony of drug profiles as substantive evidence"); *United States v. Quigley*, 890 F.2d 1019 (8th Cir. 1989) (same); *Beltran-Rios*, 878 F.2d at 1210 (criticizing

the use of expert testimony of drug profiles as substantive evidence); *Hernandez-Cuartas*, 717 F.2d at 555 (same as *Beltran-Rios*); *accord* Mark J. Kadish, *The Drug Courier Profile: In Planes, Trains, And Automobiles; and Now in the Jury Box*, 46 Am. U. L. Rev. 747 (1997) (severely criticizing the use of "drug courier profile" testimony). Although the Court may well decide at some point to resolve the tension between the cases cited above and those cited by the Solicitor General, this case is not the proper vehicle in which to do so. As will be addressed below, the cases cited by the Solicitor General are factually inapposite and the Ninth Circuit has made clear that *Vallejo* does not disapprove of the admission of *modus operandi* testimony.[15]

Most typically, the Solicitor General relies on "drug courier profile" cases in which courts permit expert witnesses to testify as to the characteristics of drug traffickers, for the ostensible purpose of evaluating the behavior of the defendant. For example, in *United States v. Foster*, 939 F.2d 445 (7th Cir. 1991), a case relied upon by the Solicitor General, *Pet.* at 16, the Seventh Circuit analyzed, on plain error review,[16] expert testimony

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[15] Another reason to decline to review this issue is that none of the case cited by the Solicitor General analyze the recent amendments to Fed. R. Evid. 702.

[16] Foster preserved only his claims that information regarding beepers was within the knowledge of the jurors and that he was limited in his cross examination. *Foster*, 939 F.2d at 450-51.

regarding various activities drug couriers undertake. *See id.* at 449-50 (listing activities, including purchasing one way tickets in cash, traveling by train, and using beepers). The Seventh Circuit permitted this evidence, finding that "Foster's *behavior* was material to the issue of knowledge and made it more probable that he knew what he was carrying." *Id.* at 451 (emphasis added). Thus, rather than endorse evidence regarding a shadowy organization that may or may not have been involved in the offense and with which Foster may or may not have been connected, the Seventh Circuit approved evidence that sought to explain *his* conduct. *Id.*; *see also United States v. Molina*, 172 F.3d 1048, 1056 (8th Cir. 1999) (evidence offered to explain defendant's activity as a lookout); *United States v. Doe*, 149 F.3d 634, 636-38 (7th Cir. 1998) (no plain error where evidence offered as an explanation for "events surrounding the seizure of the heroin shipment and Doe's arrest, the false identities used by Doe, and Doe's use of countersurveillance techniques"); *United States v. Thomas*, 74 F.3d 676, 683 (6th Cir. 1996) (testimony regarding "what items one would expect a street dealer to possess (e.g., pagers and 'rocks') and what items a street dealer would not likely possess (e.g., scales and ledgers)"); *United States v. Gastiaburo*, 16 F.3d 582, 588 (4th

Cir. 1994) (testimony regarding behavior of drug dealers and their possession of the "'tools of the trade'").[17]

Nor does *United States v. Chin*, 981 F.2d 1275 (D.C. Cir. 1992), conflict with *Vallejo* and respondent's case. While it states that as a general matter, "expert testimony on the *modus operandi* of criminals is 'commonly admitted,' particularly regarding the methods of drug dealers," *id.* at 1279 (citation omitted), that general statement says nothing as to its specific application to the facts of *Vallejo*'s case or those of respondent's case. At any rate, as was the case in *Foster*, the actual testimony in *Chin* concerned the defendant's conduct in hiring a juvenile, not a hypothetical drug trafficking organization. *Id.* at 1278-79.[18]

The Ninth Circuit, like the Circuits identified by the Solicitor General, also generally approves of *modus operandi* evidence and has repeatedly done so subsequent to its decision in *Vallejo*. For example, in *Valencia-Amezcua*, 278 F.3d 901, the Ninth

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[17] Other cases cited by the Solicitor General are simply irrelevant. For example, in *United States v. Rodriguez*, 192 F.3d 946, 949-51 (10th Cir. 1999), evidence regarding drug value was held admissible. Similar evidence was admitted in respondent's case. *Rodriguez* says nothing about structure testimony. *United States v. Flowal*, 163 F.3d 956 (6th Cir. 1998), is similarly irrelevant, dealing only with value issues and the question of whether a particular quantity is for distribution.

[18] *United States v. Khan*, 787 F.2d 28, 34-35 (2d Cir. 1986), contains a broad statement of admissibility of *modus operandi* evidence similar to that in *Chin*, but ultimately bases its ruling on the government's ability to rebut the defendant's poverty defense.

Circuit approved expert testimony regarding the typical methods of operation of a large-scale methamphetamine laboratory such as the one operated in the home in which Valencia-Amezcua was arrested. *See id.* at 908-10. *Valencia-Amezcua* easily rejected the defendant's *Vallejo* argument, noting that "*Vallejo* expressly approved admissibility of *modus operandi* testimony." *Id.* at 909. Rather, as *Valencia-Amezcua* observed, *Vallejo* is limited to "general" testimony regarding a "hypothetical drug importation operation." *Id.* at 909 n.5; *see also United States v. Beckman*, 298 F.3d 788, 795 (9th Cir. 2002) (approving cooperating codefendant's testimony regarding the drug importation operation in which the defendant was actually alleged to have participated over a *Vallejo* objection). Thus, *Valencia-Amezcua* makes clear that *Vallejo* would not require a different result in a single one of the cases cited by the Solicitor General. There is no conflict.

Similarly, the Ninth Circuit has also approved, subsequent to *Vallejo*, the admission of testimony regarding whether or not a drug trafficker would tell a courier of the presence of drugs that are very valuable. *See, e.g., United States v. Murillo*, 255 F.3d 1169 (9th Cir. 2001) (so-called "unknowing courier" testimony was admissible in drug possession case involving over one million dollars worth of methamphetamine and cocaine). The Ninth Circuit

> distinguished the testimony in *Murillo* from that in *Vallejo* by stating that unknowing drug courier testimony, unlike testimony about the structure of drug trafficking

> organizations, does not require an expert to "extrapolate about the various roles individuals might play in hypothetical drug trafficking organizations" and does not "imply that [the defendant] participated in a large-scale operation."

Pineda-Torres, 287 F.3d at 865 (quoting *Murillo*, 255 F.3d at 1177).

Like the experts discussed in the cases cited by the Solicitor General, "an expert presenting 'unknowing drug courier' testimony in a complex case looks at the specific facts involved and, in light of his experience, offers his opinion that it would be illogical and contrary to general practice for a drug trafficker to take the very risky step of entrusting his valuable cargo to an unknowing courier." *Id.* This approach stands in stark contrast to the structure expert, who "uses the 'blueprint' structure of international drug trafficking organizations as a means of [associating the defendant with a drug trafficking organization]." *Id.* The cases relied upon by the Solicitor General plainly fall in the former category: in each of them the expert examined the particular facts of the case and opined based upon his or her experience. Thus, both *Valencia-Amezcua* and *Murillo* make clear that Ninth Circuit law on *modus operandi* issues is no different from that of other Circuits, even in the wake of *Vallejo*. *Compare Chin*, 981 F.2d at 1279 ("expert testimony on the *modus operandi* of criminals is 'commonly admitted'") *with Valencia-Amezcua*, 278 F.3d at 909 ("*Vallejo* expressly approved admissibility of *modus operandi*" testimony).

C. ***Vallejo* Does Not Undermine the Administration of Justice In An Important Area of Law Enforcement.**

The Solicitor General concludes by claiming that *Vallejo* undermines the administration of justice in an important area of law enforcement. *Pet.* at 20. It does not.

The Solicitor General maintains that *Vallejo* "needlessly complicates scores of drug-importation prosecutions and risks acquittals of knowing drug couriers." *Pet.* at 20. As to the former, it is hard to understand how reducing the length of the trials, and presumably the *in limine* proceedings, by eliminating controversial testimony of highly questionable utility "complicates" anything. If the Solicitor General means to say that the conviction rate has fallen off since *Vallejo* was decided 18 months ago, he has not offered any evidence to support that notion. As to the latter, admission of such prejudicial testimony "risks [convictions] of [un]knowing couriers." In short, there is no crisis, there is no conflict.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

Dated: September 9, 2002

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AND WHAT WAS THE DEFENDANT'S REACTION?

HE WASN'T SURPRISED.

MR. SAHAM: WE WON'T BE OFFERING THAT, YOUR HONOR.

MS. BLAIR: OKAY.

THE COURT: SO I AM GRANTING THAT MOTION.

OKAY. NEXT ONE YOU HAD IS EXCLUDE EVIDENCE OF OTHER CRIMES OR ACTS.

YOU ARE NOT OFFERING 404(B).

MR. SAHAM: CORRECT.

THE COURT: I AM GRANTING THAT WITHOUT PREJUDICE.

MS. BLAIR: YOUR HONOR --

THE COURT: TO EXCLUDE EXPERT TESTIMONY.

MS. BLAIR: I APOLOGIZE TO THE COURT AND TO MR. SAHAM.

I TOOK THIS MOTION FROM ANOTHER ONE SAYING WE HAD NOT RECEIVED NOTICE. WE HAVE RECEIVED NOTICE. MR. SAHAM SENT US NOTICE ON THE 16TH OF AUGUST. SO THAT WOULD NOT BE A BASIS FOR EXCLUDING THE EXPERT TESTIMONY.

I WOULD ASK THAT IT BE EXCLUDED, HOWEVER, ON THE BASIS THAT IT IS IRRELEVANT TO THE ISSUE AT HAND. IT IS UNNECESSARY TO HELP THE JURY UNDERSTAND WHAT IS GOING ON.

IT IS A VERY SMALL AMOUNT OF MARIJUANA, A 20-KILO CASE, AND AS FAR AS ANY STRUCTURE OR ORGANIZATION, I THINK THAT IS JUST AN ATTEMPT BY THE GOVERNMENT TO INDICATE THAT MR. MCGOWAN IS GUILTY, RATHER THAN TO EXPLAIN TO THE JURY HOW

THINGS WORK. IT IS UNNECESSARY FOR THEM TO UNDERSTAND HOW THE STRUCTURE AND ORGANIZATION IS HANDLED IN MEXICO, IT HAS NO BEARING ON THIS CASE.

IN ADDITION, WE WOULD AGREE -- IN FACT HAVE AGREED TO STIPULATE TO THE VALUE OTHER THAN THE STREET VALUE, BUT THE WHOLESALE AND VALUE IN MEXICO AND THE UNITED STATES, AS WELL AS IT IS A DISTRIBUTABLE AMOUNT. WE AGREE TO STIPULATE TO THAT.

IN ADDITION, IF THE EXPERT IS ADMISSIBLE, THEN WE WOULD ASK FOR A HEARING AND THE BASIS FOR HIS OPINIONS. WHAT HAS BEEN STATED IN THE RESUME IS JUST THE TYPICAL GENERAL INFORMATION THAT THEY HAVE BEEN INVOLVED IN SEVERAL DEBRIEFINGS, DISCUSSED INFORMATION WITH OTHER AGENTS, AND HAD INTERROGATED SMUGGLERS.

WE HAVE NO BASIS THAT ANY OF THAT IS TRUE OR WHAT WAY HE BASES THIS DECISION ON OR THIS INFORMATION ON.

MR. SAHAM: YOUR HONOR, WITH RESPECT TO THE VALUE, WE THINK THAT IS INHERENTLY AN IMPORTANT PART OF THE CASE, THAT A DRUG SMUGGLER WOULD NOT -- IF THE DEFENDANT DENIED KNOWLEDGE OF THE MARIJUANA, A DRUG SMUGGLER WOULD NOT LEAVE SUCH A VALUABLE ITEM WITHOUT TELLING SOMEBODY IN THE CAR. I THINK THE VALUE IS CERTAINLY AN IMPORTANT ASPECT OF THE GOVERNMENT'S CASE.

WE WOULD ASK TO GET IN THE WHOLESALE VALUE OF MARIJUANA IN TIJUANA AS WELL AS SAN DIEGO, AND A STREET VALUE

IN THE

SUPREME COURT OF THE UNITED STATES

No. 02-64

UNITED STATES OF AMERICA,

PETITIONER,

- vs -

DANIEL JOSEPH MCGOWAN,

RESPONDENT.

RECEIVED
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SUPREME COURT, U.S.

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss:
COUNTY OF SAN DIEGO)

ISABEL AGUILA, being first duly sworn, deposes and says: That pursuant to Rule 29.4(a) of this Court she served the within MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and BRIEF FOR RESPONDENT IN OPPOSITION TO UNITED STATES' PETITION FOR WRIT OF *CERTIORARI* TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT on the counsel for Petitioner by enclosing a copy thereof in an envelope, First Class Postage Prepaid, addressed to:

HON. THEODORE B. OLSON
Solicitor General of the United States
Department of Justice
950 Pennsylvania Avenue, N.W., Room 5614
Washington, D.C. 20530

and depositing same in the United States mails at San Diego, California on June 03, 2002.

ISABEL AGUILA, Affiant

Subscribed and Sworn to before me
this 11 day of September, 2002.

PAMELA D. BISHOP
COMM. # 1219163
NOTARY PUBLIC-CALIFORNIA
SAN DIEGO COUNTY
COMM. EXP. MAY 13, 2003

Notary Public in and for said
County and State.

(SEAL)

(3)

Supreme Court, U.S.
FILED
SEP 27 2002
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No. 02-64

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

DANIEL JOSEPH MCGOWAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
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In the Supreme Court of the United States

No. 02-64

UNITED STATES OF AMERICA, PETITIONER

v.

DANIEL JOSEPH MCGOWAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Respondent has provided no persuasive reason for this Court to leave unreviewed the Ninth Circuit's "general rule" (Pet. App. 6a), which conflicts with the decisions of other circuits, that expert testimony concerning the compartmentalized structure and modus operandi of drug-trafficking organizations is inadmissible in simple drug-importation prosecutions. That evidence is important in helping the jury understand an activity—drug smuggling—that is foreign to most jurors, and provides a context for the jury to evaluate other evidence, as well as gaps in evidence. The Ninth Circuit's categorical exclusion of that evidence already has resulted in the reversal of numerous convictions, and it warrants this Court's review.[1]

A. The Ninth Circuit Categorically Excludes The Expert Testimony At Issue. Respondent asserts that the Ninth Circuit has not established a "categorical bar" to admission of the type of expert testimony at

[1] Respondent has filed a conditional cross-petition for certiorari (No. 02-5976), raising two questions involving the constitutionality and interpretation of 21 U.S.C. 952 and 960 in light of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). The government has filed a separate opposition to that cross-petition.

issue. Br. in Opp. 12; see *id.* at 10, 12-13, 28-29. That argument is contradicted by the Ninth Circuit's own decisions, not to mention the demonstrable impact that the rule of *United States* v. *Vallejo*, 237 F.3d 1008, amended, 246 F.3d 1150 (2001), already has had on drug-importation convictions in that circuit. See Pet. 9 (citing cases in which the Ninth Circuit has reversed convictions under *Vallejo*).

As explained (Pet. 8-9), in *Vallejo*, the Ninth Circuit unequivocally held that expert testimony "concerning the structure and modus operandi of drug trafficking organizations" is not relevant in a simple drug-importation prosecution brought under 21 U.S.C. 841(a)(1), 952, and 960, and that such testimony is "unfairly prejudicial." 237 F.3d at 1017. The Ninth Circuit panel in this case plainly grasped the categorical nature of that "general rule." Pet. App. 6a ("[N]one of the reasons given by the district court remove this case from *Vallejo*'s general rule."). So too, the Ninth Circuit's discussion of *Vallejo* in *United States* v. *Pineda-Torres*, 287 F.3d 860, 863-866 (2002), petition for cert. pending, No. 02-112 (filed July 22, 2002), underscores the general applicability of *Vallejo*'s prohibition.[2]

Respondent notes that in both *Vallejo* and this case, the Ninth Circuit faulted the government for not establishing a specific evidentiary link between the defendant and a particular drug-trafficking organization. See Br. in Opp. 12, 16-17; Pet. App. 5a ("Neither Vallejo,

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[2] On July 22, 2002, the government filed a petition for a writ of certiorari in *Pineda-Torres* (No. 02-112) presenting the same question as the petition in this case. The petition in No. 02-112 asks the Court to hold the case and dispose of it in light of the disposition in this case. On September 13, 2002, the Clerk directed the respondent in No. 02-112 to file a response to the petition on or before October 15, 2002.

nor McGowan, was charged with conspiracy, and in neither case did the government introduce any evidence establishing a connection between the defendant and a drug trafficking organization.") (citing *Vallejo*, 237 F.3d at 1015). But respondent fails to account for the fact that—given the compartmentalization in functions in drug-trafficking organizations, see Pet. App. 37a-38a—such evidence is generally *unavailable* to the government in a simple drug-courier prosecution such as this case and the others in which the Ninth Circuit has applied its *Vallejo* bar. The result is that the gov ernment typically will be unable to supply the evidentiary prerequisite—*i.e.*, evidence linking the defendant to a particular drug-trafficking organization—necessary, in the Ninth Circuit alone, to present a jury with the type of expert testimony at issue.

Respondent claims that decisions such as *United States* v. *Valencia-Amezcua*, 278 F.3d 901 (2002), show that the Ninth Circuit has "rejected challenges to *modus operandi* testimony." Br. in Opp. 14. *Valencia-Amezcua*, however, does not fit the common fact-pattern in which the Ninth Circuit applies "*Vallejo*'s general rule." Pet. App. 6a. *Valencia-Amezcua* did not involve a drug-importation prosecution, but rather a prosecution for illegally manufacturing and possessing methamphetamine. See 278 F.3d at 905. As explained in the petition (Pet. 9), the Ninth Circuit has been unwavering in its application of its *Vallejo* rule to exclude the expert testimony at issue in simple drug-importation prosecutions such as this, by far the most common type of drug prosecution in border districts in the Ninth Circuit like the Southern District of California. See Pet. 20.

B. This Case Is Well-Suited To Address The Question Presented. Respondent states (Br. in Opp. 13) that this case is not a "proper vehicle" in which to consider the validity of "*Vallejo*'s general rule" (Pet. App. 6a). That is incorrect. The question presented is squarely and properly presented by his case, as adequately evidenced alone by the fact that the Ninth Circuit applied its *Vallejo* rule to reverse the convictions in this case. See *id.* at 5a-7a.

Nor is respondent correct in suggesting that the record fails to support the government's challenge to the *Vallejo* rule. See Br. in Opp. 13-14. As explained in the petition (Pet. 3), the government sought to introduce the expert testimony at issue to "give a context to the situation of what is actually occurring" in order to "help[]" the jury understand "the smuggling activity itself," as well as to help explain "why taking fingerprints is not necessarily helpful in this type of case." Pet. App. 11a. The district court allowed the evidence for those purposes, stating, *inter alia*, that the evidence at issue is "important for the jury to understand how the systems works," as well as why there may not be "evidence that shows [that the defendant] touched the drug" or "loaded the drug." *Id.* at 15a-16a; see *id.* at 16a ("[The evidence] helps th[e] jury understand something that they don't know about."). And the expert testimony that was presented at trial by Special Agent Villars served those functions. See *id.* at 29a-53a.

Respondent argues that there is "no justification" for the expert testimony at issue to explain the lack of fingerprints because, he asserts, the government's own expert testified that gasoline would "destroy[] any fingerprint evidence." Br. in Opp. 14. Special Agent Villars, however, testified that there were "several reasons" why fingerprint evidence is not helpful in a

case such as this. Pet. App. 36a. In particular, he testified not only that it is difficult to lift prints from the packaging normally used to transport drugs across the border, especially when it is placed in gasoline, but also that "the person who normally loads the vehicle is not the person who drives it." *Id.* at 36a-38a. The compartmentalization testimony was key because, as Special Agent Villars emphasized, it means that "*if we were able to lift a print*, it would be of somebody south of the border." *Id.* at 36a (emphasis added). That is important to know because in most simple drug-importation cases in which drugs are secreted in a car, including this one, the government does not even attempt to recover fingerprint evidence from the packaging containing drugs or the vehicle itself for that very reason.

In any event, even if respondent's characterization of the Villars testimony were correct, the testimony is still relevant and admissible to provide the jury with an understanding of how drug-smuggling operations work. That understanding is critical to enhance the jury's evaluation of the evidence presented at trial, as well as to explain possible gaps in such evidence, and the arguments made by both sides concerning whether someone who is stopped at the border with drugs in his car but claims no knowledge of the drugs could still have "knowingly" sought to import them into this country. As explained (Pet. 13), the testimony is not introduced as an implicit statement that persons such as respondent *are* drug couriers, but only that they *might* be, even though the defendant claims no knowledge of the drugs in his car and there is not more physical evidence linking the defendant to the drugs. A jury is left to

draw its own conclusion based on inferences that it may reasonably draw from the evidence.[3]

C. The Circuit Conflict Is Genuine. Respondent attempts to reconcile "*Vallejo*'s general rule" (Pet. App. 6a) with the decisions in other circuits that have allowed the sort of expert testimony categorically barred by the Ninth Circuit, asserting that "not a single case cited by the Solicitor General conflicts with *Vallejo*." Br. in Opp. 14. That argument cannot be squared with the case law discussed in the petition (Pet. 16-19), in which courts of appeals outside the Ninth Circuit have readily allowed expert testimony concerning the structure and modus operandi of drug-trafficking organizations in similar drug-smuggling prosecutions. Indeed, later in his opposition, respondent himself acknowledges that there is "tension" between the cases discussed in the petition and on which he now relies. Br. in Opp. 30.

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[3] Respondent states that the government "appears to concede that no affirmative mention of fingerprints was made until after Agent Villars testified on direct." Br. in Opp. 11 n.4. As noted (Pet. 7 n.3), however, respondent's counsel laid the groundwork for an argument based on the absence of fingerprints when she asked Inspector Williams—before Special Agent Villars took the stand —whether he "use[d] gloves" when he removed the drugs from respondent's vehicle. 8/29/00 Tr. 245. In any event, the government's ability to inform jurors about the structure and modus operandi of drug-trafficking organizations should not turn on a *defendant's* decision whether to point to the lack-of-fingerprint evidence. Among other things, as this case illustrates, defense counsel may allude to the lack of fingerprints, while maintaining that the defendant has not affirmatively raised such a defense. In addition, even when a defendant makes no reference to the lack of fingerprints or other physical evidence tying him to drugs found in his car, a jury on its own may well draw a negative inference from the fact that the government did not present such evidence. See Pet. 11.

Respondent claims (Br. in Opp. 28) that there is no conflict because the cases from other circuits do not focus on the need for the government to show a link between the defendant and a particular drug-trafficking organization as a prerequisite to introducing the type of expert testimony at issue. It is true that the cases do not focus on, or require, such a link. But far from dispelling the conflict, the fact that the other circuits have not adopted such an evidentiary prerequisite further underscores the novelty of the Ninth Circuit's *Vallejo* rule.

For example, in *United States* v. *Foster*, 939 F.2d 445 (1991), the Seventh Circuit did not focus on whether the government had shown that the defendant was tied to a specific drug-trafficking organization. Rather, in upholding the trial court's admission of the modus operandi expert testimony at issue, the court emphasized that the testimony was relevant and admissible to place the evidence "in context" for the jury, and "to offer another explanation for [seemingly innocent] behavior." *Id.* at 451-452. So too, in *United States* v. *Chin*, 981 F.2d 1275, 1279 (1992), cert. denied, 508 U.S. 923 (1993), the D.C. Circuit did not suggest that the admissibility of expert testimony on drug-trafficking operations is contingent on establishing that the defendant belongs to a particular drug-trafficking organization, but instead recognized that such evidence "is 'commonly admitted.'" In the Ninth Circuit, by contrast, such expert testimony is not admissible in a drug-importation prosecution unless the government establishes an evidentiary link between the defendant and a particular drug-trafficking organization.[4]

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[4] *United States* v. *Long*, 917 F.2d 691 (2d Cir. 1990), relied upon by respondent (Br. in Opp. 28), does not support the Ninth Circuit's *Vallejo* rule. *Long* involved a RICO prosecution against

Respondent's reliance on cases barring the admission of "'drug-courier profile' evidence" is misplaced. Br. in Opp. 29; see *id.* 29-30. As explained (Pet. 15 n.6), although it can take different forms, so-called drug-courier profile evidence typically is used to link characteristics of the defendant to a generalized profile of drug couriers used in investigations and to argue, based on that comparison, that the defendant is guilty. For example, in *United States* v. *Brito*, 136 F.3d 397, 412 (5th Cir.), cert. denied, 523 U.S. 1128 (1998), relied upon by respondent, the witness "described a profile of family drug organizations and then compared the [defendants'] actions to that profile." The court of appeals held that "[t]his type of profile evidence is inadmissible to prove substantive guilt based on similarities between defendants and a profile." *Ibid.* By contrast, the type of expert testimony at issue in this case is not introduced to compare a defendant to an investigative profile of known criminals, but instead, *inter alia*, to provide the jury with a general understanding of a trade about which jurors usually lack familiarity and a context in which to evaluate the evidence, as well as possible gaps in evidence, at trial.[5]

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teamsters officials with organized crime contacts. The Second Circuit held that the trial court improperly admitted certain expert testimony concerning "organized crime." *Id.* at 701. But far from adopting the sort of *categorical* prohibition established by the Ninth Circuit in *Vallejo*, the Second Circuit in *Long* carefully grounded its decision in the particular circumstances of that case, including its determination that there was "no need to call an expert to explain [how organized crime families operate]" when one of the fact witnesses, a member of an organized crime family, could have provided such an explanation. *Id.* at 702.

[5] The other drug-courier profile cases cited by respondent are similarly inapposite. See, *e.g.*, *United States* v. *Jones*, 913 F.2d 174, 177 (4th Cir. 1990) (drug-courier profile evidence was erroneously

Respondent claims that the petition in this case "jump[s] the gun," because other circuits have not explicitly rejected *Vallejo*. Br. in Opp. 28. As discussed (Pet. 16-19), however, the *Vallejo* rule is clearly out of step with the decisions in other circuits concerning the admissibility of expert testimony on the structure and modus operandi of drug-trafficking operations. Moreover, certiorari is warranted based on the immediate and serious impact that the *Vallejo* rule has had in the Ninth Circuit—home to the Nation's busiest ports of entry with Mexico—on the government's effort to stem the tide of illegal drugs being smuggled into this country. Cf. *United States* v. *Sokolow*, 490 U.S. 1, 7 (1989) ("We grant certiorari to review the decision of the [Ninth Circuit] because of its serious implications for the enforcement of the federal narcotics laws.") (citation omitted).

D. Respondent's Arguments On The Merits Provide No Reason For Denying Certiorari. Respondent's effort to defend the merits of "*Vallejo*'s general rule" fares no better than the reasoning of the Ninth Circuit in adopting and applying that rule. Br. in Opp. 15, 20-27. As the government has explained (Pet. 10-15), the Ninth Circuit's categorical prohibition on admission of the type of expert testimony at issue conflicts with both a textual and common-sense reading of the Federal Rules of Evidence and overrides the traditionally broad discretion that trial courts enjoy in admitting evidence. In particular, respondent errs in suggesting that *Old Chief* v. *United States*, 519 U.S. 172 (1997), "supports the Court of Appeals' decision" in this case. Br. in Opp.

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admitted when government sought to use evidence *not* as "purely background material," but instead "to establish the defendant's guilt by showing that he has the same characteristics as a drug courier"), cert. denied, 498 U.S. 1052 (1991).

25; see *id.* at 27. *Old Chief* provides no support for the *Vallejo* rule; to the contrary, it only casts further doubt on that rule. See Pet. 14-15. In any event, respondent's arguments on the merits are premature at this stage and provide no basis for denying certiorari.

E. The Question Presented Is Demonstrably Important. Finally, respondent states that the government's concern (see Pet. 20) over the impact of "*Vallejo*'s general rule" (Pet. App. 6a) on the administration of justice is unfounded. Br. in Opp. 35. But the number of convictions—including those in this case—that already have been invalidated by the Ninth Circuit under *Vallejo* proves just the opposite. See Pet. 9. Simple drug-importation prosecutions analogous to the prosecution in this case recur continuously—indeed, well more than a thousand times a year—in the Southern District of California and the District of Arizona. This Court should grant review and decide whether the admission of the expert testimony at issue is, as the Ninth Circuit has categorically held, proscribed by the Federal Rules of Evidence.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

SEPTEMBER 2002